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The Nebraska Criminal Law Practitioner's Guide to Representing Non-Citizens in State Court Proceedings: July 2021

Kevin Ruser
University of Nebraska College of Law, kruser1@unl.edu

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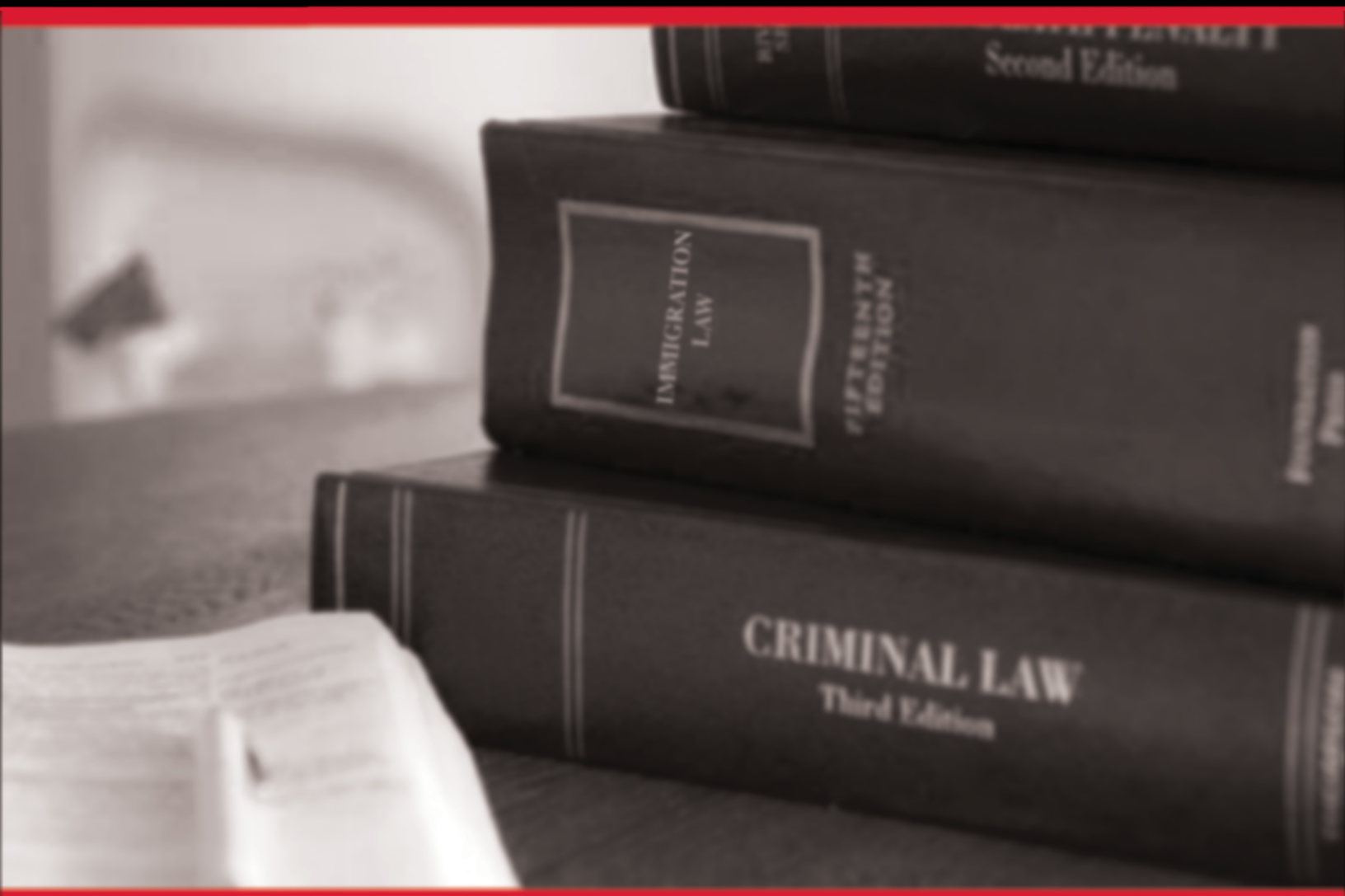

The Nebraska Criminal Law Practitioner's Guide to Representing Non-Citizens in State Court Proceedings

2021 Edition

Professor Kevin Ruser

THE NEBRASKA CRIMINAL LAW PRACTITIONER'S GUIDE TO REPRESENTING NON-CITIZENS IN STATE COURT PROCEEDINGS

by Kevin Ruser

Revised 2010, 2012, 2021

FOREWORD TO THE 2021 EDITION

This Guide was last significantly updated in 2012 – nine years ago. In 2012, I wrote about how many developments there had been in the "crimmigration" field since the 2010 update to this Guide. Those developments pale in comparison to the developments that have occurred since 2012, however, both in terms of numbers and significance.

The United States Supreme Court has been a major player in this area since 2012, weighing in with a number of significant decisions during that period of time. In fact, two of those decisions, *Moncrieffe v. Holder* and *Descamps v. U.S.*, fundamentally altered the way in which state statutes must be analyzed in order to determine if they carry immigration consequences for non-citizens. I have included a detailed discussion of these and other Supreme Court cases in the text of this edition and incorporated the holdings of those cases in the analyses of the Nebraska criminal statutes that accompany this edition of the Guide.

The Nebraska Supreme Court has also issued some interesting opinions in the last several years regarding post conviction relief in cases involving either failure of a court to give the immigration advisement to a defendant, as required by Neb. Rev. Stat. § 29-1819.02, or as the result of criminal defense counsel failing to give *Padilla* advice to a non-citizen client entering a guilty plea. This edition of the Guide includes my take on those state cases as well.

In an effort to make this Guide more user-friendly for criminal law practitioners, I have significantly altered the format of the statutory analysis appendix. Now, as you will see, the appendix takes the form of a chart that discusses the most important aspects of immigration consequences. My inspiration for this format came from the superb work being done by Kathy Brady and her folks with the Immigrant Legal Resource Center in their analysis of immigration consequences of selected California offenses. I was struck by the compact nature and succinctness of this format. I hope that you will find this chart format to be easier and quicker to use on a day-to-day basis, whether it be in the courtroom, the courthouse hallway, or your office. The major downside I see to this new format is that it is essential that you carefully read the introductory text in order to sus out the immigration consequences for your particular clients. For example, my chart does not consider immigration consequences peculiar to DACA recipients – but that issue is explored in detail in the introductory text.

As with each past edition of this Guide, I invite your comments, critiques, thoughts and contributions. As it has been from the beginning, my goal is to be as helpful to criminal practitioners as possible. Your input certainly makes it more likely I will achieve that goal.

As I have done in all past editions, I would like to take a point of personal privilege to thank all of those who have supported me in the latest endeavor, from my family to my co-workers in the Clinic to the College of Law itself, without whose help and encouragement none

of this could have happened. Dean Richard Moberly was gracious enough to approve my sabbatical request for the fall semester of 2020, during which most of the updates to this Guide were completed. Those tireless advocates who work, day in and day out, in the Douglas County and Lancaster County Public Defender's offices were very helpful in steering me toward the most frequently-charged offenses to analyze. It was also the idea of Ally Mendoza and her colleagues in the Douglas County Public Defender's office to analyze some of the more frequently-charged municipal code ordinances. Mark Carraher from the Lancaster County Public Defender's office weighed in on Lincoln ordinances that his office sees with some frequency. As both Ally and Mark are alums of the College of Law's Immigration Clinic, I am particularly gratified for their input.

My research assistants, Chelsey Borchardt, Jordan Klein, and Max Tierney, along with Stefanie Pearlman, who steered both Chelsey and Max my way through her legal research fellowship program here at the College of Law, were instrumental in keeping me on track and making this Guide significantly better than it would have otherwise been without their help. Jordan in particular, exhibited much courage in agreeing to work with me, since he was an undergraduate student at Doane University during the time he worked on this Guide, and had to summon up the courage to attempt legal research and analysis without having been to law school. Thanks, Jordan. You did great. Sara Houston, Assistant Professor and Director of the Law, Politics and Society Program at Doane University, worked extensively with Chelsey and Jordan to get them up to speed and supervise much of their work during the time they helped with the Guide, and I very much appreciate not only her work with those folks, but also her substantive contributions to the contents of the Guide itself.

To my co-workers and tireless proofreaders/editors, Deanna Lubken and Sydnee Schuyler, I owe more than I can ever count. Deanna has worked with me in some fashion since our days together at Western Nebraska Legal Services in the early 1980's, and has been saving me from myself for all of these years. Most would question why she has chosen to put up with me for so long – and they would be right to do that. But I remain grateful for both her poor judgment in associating with me for such a long time and her invaluable contributions. Sydnee is a much more recent addition, but I have come to rely heavily on her good eye and discerning voice as well. This Guide is far better than it would be without their involvement.

Finally, to my wife, Sara Houston, thank you for all of your love, help, support, encouragement, and ideas that have improved not only this Guide, but me. I could not have done it without you.

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THE NEBRASKA CRIMINAL LAW PRACTITIONER'S GUIDE TO REPRESENTING NON-CITIZENS IN STATE COURT PROCEEDINGS

I. OVERVIEW.

A. Introduction.

On March 31, 2010, the lives of criminal law practitioners changed dramatically. On that day, the United States Supreme Court issued a landmark decision in the case of *Padilla v. Kentucky*,[1] holding that criminal defendants have a Sixth Amendment right to be advised by their lawyers of the potential immigration consequences of guilty pleas they are contemplating. It is my hope that this Guide will be of assistance to criminal defense attorneys, prosecutors, and judges as they negotiate the mine field that lies at the intersection of criminal and immigration law.

The scope of this Guide is limited to potential immigration consequences of Nebraska state criminal proceedings. And even with that limitation, this Guide is far from comprehensive in its treatment of Nebraska state criminal law. The goals of this Guide are to give Nebraska criminal law practitioners and judges an overview of the federal immigration system, acquaint them with immigration issues that may arise as the result of state criminal proceedings, and analyze various Nebraska criminal statutes in terms of their potential immigration consequences. Having said that, I readily admit that there are likely a number of issues this Guide does not address. For that, I apologize in advance. I had to make choices about what to include and what to omit, and those choices will inevitably disappoint some.

I invite those who use this Guide to give me feedback on how it could be improved. I will continue to update this Guide periodically, and would like it to be as useful to Nebraska practitioners and judges as possible.

B. Why This Stuff is Important.

1. Changes in the Law.

Although the *Padilla* decision certainly highlighted the "crimmigration" area, criminal convictions have always been a problem for individuals who are not citizens of the United States. The Immigration and Nationality Act (INA)[2] has

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[1] 559 U.S. 356 (2010).

[2] The Immigration and Nationality Act, found at Title 8 of the United States Code, is the major piece of legislation governing federal immigration law. The current version of the INA was enacted in 1952, but has been amended frequently since first being enacted.

always contained provisions that could result in the deportation of those non-citizens convicted of a criminal offense. However, as the *Padilla* opinion recognized,[3] the stakes are as high today as they have ever been for non-citizens facing criminal proceedings.

Two major pieces of legislation were enacted in 1996 that dramatically increased the negative consequences for non-citizens facing criminal proceedings. Those laws are the Antiterrorism and Effective Death Penalty Act (AEDPA)[4] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[5] This Guide will address specific changes wrought by those laws in the course of discussing individual topics. However, suffice it to say that the AEDPA/IIRIRA combination was decidedly anti-immigrant. Since April 1, 1997, the effective date of most of IIRIRA's provisions, the working assumption of criminal defense lawyers should be that non-citizens charged with or convicted of most crimes will find themselves in deportation proceedings.[6] Although this will not always hold true, it is now more often true than not. Further, AEDPA and IIRIRA drastically restricted a non-citizen's ability to avoid deportation if he or she is being deported because of a criminal conviction.

Practically speaking, a client's immigration status will nearly always make a difference in the way a criminal prosecution proceeds. Prosecutors are increasingly aware of a criminal defendant's immigration status, and undoubtedly will use that information in deciding how to prosecute a case, what type of plea bargains to accept, and what sentencing recommendations to make. And in the wake of *Padilla*, criminal defense attorneys now have a constitutional duty to be well-informed. Those who are not well-informed risk not only having convictions vacated by successful post conviction claims, but stand to do their non-citizen clients a huge disservice. Furthermore, once a final criminal conviction is entered against a non-citizen, there are limited remedies an immigration attorney can invoke to ameliorate the immigration consequences of

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[3] 559 U.S. at 360.

[4] Pub.L. No. 104-132, 110 Stat. 1214 (1996).

[5] Pub.L. No. 104-208, 110 Stat. 3009 (1996).

[6] On January 25, 2017, President Trump issued Executive Order 13768, establishing new enforcement priorities in the interior of the U.S. This Executive Order expressly terminated all provisions of the November 20, 2014 memo issued by former DHS Secretary Jeh Johnson regarding ICE enforcement priorities. In essence, this Executive Order made all undocumented or out of status immigrants fair game for deportation. The Biden Administration has indicated that it will alter these priorities, and be more targeted in the approach it takes to deciding which immigrants to target for removal, but as of this writing, we are still awaiting further specifics about the Biden Administration's removal priorities and what they might mean in practice.

such a conviction. It is therefore mandatory that criminal law practitioners become familiar with immigration law so that they can try to minimize the impact of criminal proceedings on non-citizen clients before a final conviction is entered against them.

2. Demographics.

The complexion of Nebraska's demographics is changing. Once a nearly homogeneous state, in the past nearly four decades Nebraska has experienced a dramatic influx of foreign-born individuals. Refugees from Vietnam, Sudan, Iraq, and various other countries from central and eastern Europe have settled in Nebraska. But by far the greatest change has occurred in the area of Nebraska's Latino population. One need only look at figures from the United States Census Bureau to get a sense of the enormity of this change.

In 1990, the U.S. Census Bureau put Nebraska's total population at 1.57 million people. Of that number, 36,969 individuals, or approximately 2.3%, were of Hispanic origin.[7] The 2000 census indicated a total population in Nebraska of 1.7 million people. Yet the Hispanic population in Nebraska in 2000 totaled 94,119 people, or approximately 5.5% of the population, making Nebraska's Hispanic population the largest minority population in the state.[8] Viewed another way, Nebraska's Hispanic population increased by 57,150 during the decade of 1990-2000. While Nebraska's total population increased by 130,000 during that decade, Nebraskans of Hispanic origin represented 44% of that population gain. Nebraska's population increased 8.3% between 1990 and 2000.

Without the increase in the Hispanic population, Nebraska would have experienced a population growth of only 4.6% during this time.[9]

This trend is also reflected by the 2010 census figures. The 2010 census shows that Nebraska's total population was 1.8 million people. The total population increased by around 115,000 people, or 6.7%, between 2000 and 2010. The white population of Nebraska increased by around 39,500 people, or by 2.6% from 2000 to 2010. The Hispanic population increased by around nearly 73,000

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[7] U.S. Bureau of the Census, 1990 Census of Population (1992), https://www2.census.gov/library/publications/decennial/1990/cp-1/cp-1-1.pdf (last visited October 28, 2020).

[8] U.S. Bureau of the Census, Profiles of General Demographic Characteristics: 2000 Census of Population & Housing (2001), https://www.census.gov/content/dam/Census/library/publications/2001/dec/2khus.pdf (last visited October 28, 2020).

[9] All figures come from comparing the numbers of the 1990 U.S. Census with figures from the 2000 U.S. Census.

people, or by 77.3%. The increase in Nebraska's Hispanic population between 2000 and 2010 accounted for 64% of Nebraska's population gain between 2000 and 2010. Without the gain in Hispanic population, Nebraska would have grown by only 42,000 people, or 2.6%.[10]

According to the 2020 census, Nebraska's population stood at 1.96 million people, an increase of just a little over 135,000 (around 7%) since the 2010 census. Nebraska's "white alone" population (not including Hispanics or Latinos) totaled around 1.67 million individuals. Hispanics and Latinos accounted for 11.3% of the total population, or a total of approximately 219,000 individuals. So, since the most recent immigrant influx began in Nebraska in the 1990s, Latinos have grown by a total of approximately 182,000 individuals, and by a percentage of over 9%. That trend is likely to continue into the foreseeable future.[11]

Of course, not all of the growth in Nebraska's Hispanic community has been as the result of immigration. But the numbers suggest that a large portion of that increase was because of immigrants coming to Nebraska to work in the meatpacking industry. The 2019 Hispanic population exceeded the statewide average in 15 Nebraska counties.[12] Many of those counties host or are adjacent to counties that host businesses related to and involved in the meatpacking industry. In some of those counties, the increase in the Hispanic population during the 1990-2020 time period was nothing short of dramatic.[13]

There is no reason to believe that the increase in Nebraska's foreign-born and minority population, which began to take off during the 1990's, will slow down to an appreciable degree in the foreseeable future. If Nebraska follows the national

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[10] All figures come from the 2010 U.S. Census. U.S. Census Bureau, United States: 2010 Summary Population & Housing Characteristics (2013), https://www2.census.gov/library/publications/2012/dec/cph-1-1.pdf (last visited October 28, 2020).

[11] These statistics are taken from the last figures available on the U.S. Census Bureau's website: https://data.census.gov/cedsci/profile?g=0400000US31 (last visited May 24, 2021).

[12] Box Butte (12.5%), Chase (12.3%), Colfax (45.4%), Dakota (38.8%), Dawson (33.3%), Dixon (13.7%), Dodge (12.9%), Douglas (12.6%), Dundy (11.8%), Hall (27.7%), Madison (15%), Morrill (15.4%), Platte (19%), Saline (25.3%), and Scotts Bluff (23.8%). U.S. Census Bureau website, https://data.census.gov/cedsci/profile?g=0400000US31 (last visited May 25, 2021).

[13] Colfax County (Schuyler) is such an example. The 1990 census indicated a Hispanic population in Colfax County of 224 people, which represented 2.5% of the total population. By 2019, there were approximately 4894 people of Hispanic origin living in Colfax County, representing approximately 45.4% of the total population.

trend, Nebraska's Hispanic population will continue to increase. While not all of this increase will be in the form of new immigrants, much of it could be, given recent history. And, in general, with more people come more legal problems, so Nebraska criminal law practitioners will continue to confront the issue of how best to represent non-citizens facing criminal proceedings.

C. How This Guide is Organized.

This Guide is structured to provide an overview of the immigration agency structure and the procedures involved when various divisions of the Departments of Homeland Security and Justice attempt to remove a non-U.S. citizen from the United States. Following those overviews, the Guide provides a more detailed discussion of the specific immigration consequences that could flow from Nebraska state court criminal proceedings.

The heart of this Guide are the charts containing analyses of immigration consequences of various Nebraska statutes and municipal ordinances. Those charts contain my analyses of selected Nebraska criminal statutes in terms of the possible immigration consequences to a non-U.S. citizen client if the client is charged with or convicted of a crime under the statute or ordinance in question. It is my hope that practitioners will, if nothing else, be able to use the charts to quickly access my analyses of potential immigration consequences of selected state and municipal criminal proceedings.

There are also attachments at the end of this Guide that contain various forms or resource materials that I believe will be helpful to the criminal defense lawyer who represents a non-U.S. citizen in state court criminal proceedings.

D. General Issues Facing Counsel Involved in Representing Non-U.S. Citizens in Criminal Proceedings.

1. Nebraska Statutory Provisions.

Although the immigration implications of criminal proceedings have always lurked in the background as an issue for Nebraska practitioners, they came to the forefront as the result of the passage of LB 82 in 2002, codified at Neb. Rev. Stat. § 29-1819.02, et seq.

The purpose of the law, as set forth in the statute itself, is to make certain that non-U.S. citizen criminal defendants are advised by a court that entry of a plea of guilty or *nolo contendere* may have immigration consequences. Further, the Legislature intended that, in the event a criminal defendant or his or her lawyer was unaware that a guilty or *nolo* plea might carry immigration consequences, the court should grant the defendant additional time to negotiate with the

prosecutor.[14] In addition, the statute expressly provides that no defendant should be required to reveal his or her immigration status to the court.[15]

Section 29-1819.02 requires courts to administer the following advisement to criminal defendants prior to the acceptance of a plea of guilty or *nolo contendere*:

> "If you are not a United States citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of removal from the United States, or denial of naturalization pursuant to the laws of the United States."[16]

Failure of a court to give this advisement after July 20, 2002, the effective date of the statute, requires a court, upon a motion by the defendant coupled with a showing that conviction **may** have immigration consequences of the type described in the statute, to vacate the judgment of conviction and permit the defendant to withdraw his or her guilty plea.[17] If no record is made that the advisement was given, there is a presumption that it was not given.[18] Nebraska cases interpreting the provisions of this statutory scheme are discussed in further detail in Section I.D.2.b(2)., *infra*.

2. Case Law –- Duty of Courts and Counsel to Advise.

Before examining the Supreme Court's decision in *Padilla v. Kentucky*, it is useful to take a look at some of the federal and state jurisprudential history of the statutory and constitutional obligations of both courts and counsel to advise defendants of potential immigration consequences of guilty pleas.

The case law in Nebraska has thus far focused on three questions when it comes to possible immigration consequences of criminal proceedings: (1) does a trial court have a constitutional duty to inform a criminal defendant of the possible

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[14] Neb. Rev. Stat. § 29-1819.03.

[15] *Id*. In my experience, some judges routinely ask criminal defendants preparing to enter a guilty plea if they are U.S. citizens. This question appears to violate the provisions of the statute. And, in fact, there is no need to ask this question. The statutory advisement should routinely be given to all criminal defendants, regardless of their immigration status.

[16] Neb. Rev. Stat. § 29-1819.02(1). There is a limitation to the scope of this statute, however. The advisement need not be given by the court if the offense in question is only an infraction. *Id*.

[17] Neb. Rev. Stat. § 29-1819.02(2).

[18] *Id*.

immigration consequences of criminal proceedings; (2) what are the parameters of a court's duty to give to defendants entering *nolo* or guilty pleas the statutory advisement found in Neb. Rev. Stat. § 29-1819.02 and what remedies are available to defendants if the statutory advisement is not given properly; and (3) what are the contours of criminal defense counsel's *Padilla* obligations?

a. Constitutional Duty of Courts to Advise.

In *State v. Schneider*,[19] the Nebraska Supreme Court held that trial courts have no constitutional obligation to inform criminal defendants of collateral consequences to their entry of guilty pleas.[20] The defendant in *Schneider* contended that the trial court's failure to advise him that he would have to register as a sex offender if he pled guilty to two counts of attempted sexual contact with a child rendered his guilty pleas unintelligent, unknowing, and involuntary. As a result, Schneider sought leave to withdraw his pleas at his sentencing hearing.

The Nebraska Supreme Court held that failure of the trial court to advise Schneider that he would have to register as a sex offender was a "collateral consequence" of the criminal proceedings, citing *State v. Torres*.[21] The Court held that, given such a determination, there was no constitutional requirement for the trial court to advise Schneider that he would have to register as a sex offender, employing the *Boykin* test.[22] As a result, the Court held that Schneider's guilty pleas were intelligent, knowing, and voluntary, and further held that he had no right to withdraw them as a matter of constitutional principle.[23]

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[19] 263 Neb. 318, 324, 640 N.W.2d 8, 15 (2002).

[20] While the *Schneider* case did not involve an immigration issue, it is instructive because it discusses the collateral consequences doctrine.

[21] 254 Neb. 247, 575 N.W.2d 861 (1998).

[22] *Boykin v. Alabama*, 395 U.S. 238 (1969). In *Boykin*, the Supreme Court held that constitutional principles require an affirmative showing that any guilty plea entered into by a criminal defendant and accepted by a trial court be done knowingly, intelligently, and voluntarily.

[23] The Court also held that the trial court did not abuse its discretion in refusing to allow Schneider to withdraw his guilty pleas "for any fair and just reason." *Schneider*, 263 Neb. at 325, 640. N.W.2d at 14. It is interesting to contrast this holding with that of the court in *United States v. Singh*, 305 F. Supp. 2d 109 (D.D.C. 2004), where the court allowed the defendant to withdraw a guilty plea, pursuant to Fed. R. Crim. P. 11(d), due to the fact that his being advised that he "might" be deported after pleading guilty to an aggravated felony constituted a "fair and just" reason for withdrawing the plea. The defendant filed his motion under 28 U.S.C. § 2255. Some courts have agreed with *Singh* (*see, e.g., United States v. Couto*, 311 F.3d 179 (2d Cir.

The Nebraska Supreme Court has also held that trial courts have no constitutional obligation to advise criminal defendants entering *nolo* or guilty pleas of the immigration consequences of those pleas.[24] In *Yos-Chiguil*, the court cited to a 2010 post-*Padilla* decision of the Georgia Supreme Court in support of this conclusion. That decision, *Smith v. State*,[25] expressly holds that, even in the wake of the *Padilla* decision, immigration consequences of criminal proceedings remain collateral consequences, at least for purposes of whether a trial court has a constitutional obligation to advise a defendant of such consequences. The Georgia Supreme Court defined "collateral" consequences as those that do not lengthen or alter the sentence imposed by a trial court. In the Georgia Supreme Court's view, *Padilla* did not convert immigration consequences into direct consequences of criminal proceedings for purposes of a Fifth Amendment analysis; rather, the court opined, it simply held that the Sixth Amendment requires trial counsel to advise clients of potential immigration consequences because prevailing professional norms require such advice by effective defense counsel.

One wonders about the underpinnings of this analysis. Almost routinely before *Padilla*, courts held that the direct/collateral distinction meant something in the Sixth Amendment context.[26] But that notion was shattered by *Padilla*:

> The Supreme Court of Kentucky rejected Padilla's ineffectiveness claim on the ground that the advice he sought about the risk of deportation concerned only collateral matters, i.e., those matters not within the sentencing authority of the state trial court. In its view, "collateral consequences are outside the scope of representation required by the Sixth Amendment," and,

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2002)), while others have not (*see, e.g., Santo-Sanchez v. United States*, 548 F.3d 327 (5th Cir. 2008)). A more recent decision of the Second Circuit expressly held that non-compliance with Rule 11's advisement requirements results in a constitutionally defective guilty plea. *United States v. Gonzalez*, 884 F.3d 457 (2d Cir. 2018).

[24] *State v. Yos-Chiguil*, 281 Neb. 618, 626, 798 N.W.2d 832, 840 (2011).

[25] 287 Ga. 391, 697 S.E.2d 177 (2010), *overruled on other grounds by Collier v. State,* 307 Ga. 363, 834 S.E.2d 769 (2019).

[26] For example, in a pre-*Padilla* decision, the Nebraska Supreme Court, in *State v. Zarate*, 264 Neb. 690, 651 N.W.2d 215 (2002), held that immigration consequences were collateral consequences of a criminal proceeding, and therefore effective criminal defense counsel did not have to advise a client of such consequences when counseling the client about whether to plead guilty to a crime. *Zarate* has obviously been overruled by *Padilla*.

> therefore, the "failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel." 253 S.W.3d, at 483. The Kentucky high court is far from alone in this view.
>
> We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally "reasonable professional assistance" required under *Strickland*, 466 U.S., at 689, 104 S.Ct. 2052. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.[27]

So it is clear that, in an immigration context, the direct/collateral distinction is meaningless for purposes of a Sixth Amendment analysis. Rather, the touchstone inquiry is whether defense counsel's advice is ineffective under a *Strickland* analysis. In other words, the direct/collateral distinction is no longer applicable in the Sixth Amendment context, as the court made clear in *Padilla*. But most courts would hold that the direct/collateral distinction is still alive and well in the Fifth Amendment context. Why?

One suspects that the answer to this question lies in the courts' fear of the "slippery slope" – if the Fifth Amendment requires a court to advise of all collateral consequences of a guilty plea in order for that plea to be knowing and voluntary for Fifth Amendment purposes, where do courts draw the line? Most courts would likely hold that a rule requiring a judge to advise a criminal defendant of all consequences to a guilty plea would simply be unworkable.[28]

But is that a sufficient answer, particularly in the immigration context? *Padilla* makes it clear that there is something different and unique about immigration consequences of criminal proceedings, as compared to all other types of consequences flowing from a conviction or guilty plea:

> We have long recognized that deportation is a particularly severe "penalty"; but it is not, in a strict sense, a criminal

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[27] *Padilla*, 559 U.S. at 364-365 (internal footnotes omitted).

[28] The Georgia Supreme Court took comfort in the fact that the combination of (1) *Padilla* and (2) the existence of a Georgia statute requiring trial courts to give criminal defendants a general advisement regarding immigration consequences at the time of accepting a guilty plea likely provide adequate constitutional protection to defendants, thereby making their guilty pleas knowing and voluntary. *Smith v. State*, 287 Ga. 391, 697 S.E.2d 177 (2010).

> sanction. Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it "most difficult" to divorce the penalty from the conviction in the deportation context. Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult.[29]

That difference – that uniqueness of immigration consequences – led the *Padilla* Court to hold that the direct/collateral distinction for purposes of Sixth Amendment analysis simply does not exist. Given the Court's recognition of the unique and severe nature of immigration consequences, does the direct/collateral distinction make sense in the Fifth Amendment context either? And wouldn't the answer to the "slippery slope" argument be that this one category of consequence, which is both unique and singularly severe, must be disclosed by a court to a defendant in order to make that defendant's plea knowing and voluntary?[30]

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[29] *Padilla*, 559 U.S. at 365-366 (internal citations omitted).

[30] Indeed, the Court has held as much in the Sixth Amendment context in *Lee v. United States*, 137 S. Ct. 1958, 198 L. Ed. 2d 476 (2017). In that case, the government argued that the defendant demonstrated that he would not have pled guilty to a criminal offense had he known that it carried immigration consequences, even though the evidence of his guilt was strong and the likelihood that he would have been convicted at trial was high. But the Court held the likelihood of conviction at trial was the wrong focus in a case where a defendant claimed that lack of information about immigration consequences affected his decision-making at the plea stage:

> When a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial "would have been different" than the result of the plea bargain. That is because, while we ordinarily "apply a strong presumption of reliability to judicial proceedings," "we cannot accord" any such presumption "to judicial proceedings that never took place." We instead consider whether the defendant was prejudiced by the "denial of the entire judicial proceeding ... to which he had a right." As we held in Hill v. Lockhart, when a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and

Here's how the argument sets up. Although it is undeniably a Sixth Amendment case, *Padilla* says that immigration consequences are actually part of the penalty faced by non-citizens in criminal proceedings:

> In 1996, Congress also eliminated the Attorney General's authority to grant discretionary relief from deportation, 110 Stat. 3009–596, an authority that had been exercised to prevent the deportation of over 10,000 noncitizens during the 5–year period prior to 1996. Under contemporary law, if a noncitizen has committed a removable offense after the 1996 effective date of these amendments, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses. Subject to limited exceptions, this discretionary relief is not available for an offense related to trafficking in a controlled substance.
>
> These changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. <u>These changes confirm our view that, as a matter of federal law, deportation is an integral part – indeed, sometimes the most important part – of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes</u>.[31]

If, at least in the immigration context, immigration consequences are indeed part of the penalty faced by non-citizen criminal defendants, then under the rationale of *Boykin*, courts receiving guilty pleas have a constitutional obligation under the Due Process clause to insure that defendants have been advised of such a penalty, in order to ascertain that a guilty plea has been entered voluntarily and understandingly. At the federal level, courts have a duty to make certain defendants entering a guilty plea are aware of the possible maximum and minimum penalty they

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would have insisted on going to trial*." Id*. at 1965, 198 L. Ed. 2d at 484-85 (internal citations omitted).

[31] *Padilla*, 559 U.S. at 363-364 (internal citations and footnotes omitted; emphasis supplied).

face.[32] At the state level, Nebraska common law imposes this requirement on trial courts.[33] So there is a plausible argument that trial courts are compelled not only by Neb. Rev. Stat. § 29-1819.02 to inquire into a defendant's awareness of possible immigration consequences, but are also constitutionally compelled to make such an inquiry.[34]

b. Statutory and Rule-Based Duty of Courts to Advise.

(1) Fed. R. Crim. P., R. 11.

A 2013 amendment to Rule 11 of the Federal Rules of Criminal Procedure requires that federal courts accepting guilty pleas advise defendants that the plea may have immigration consequences.[35] In 2002, the Nebraska Legislature adopted LB 82, which is codified at Neb. Rev. Stat. § 29-1819.02, requiring Nebraska courts to give a similar advisement.

(2) Neb. Rev. Stat. § 29-1819.02.

The Nebraska Supreme Court has decided several cases since 2002 applying the provisions of Neb. Rev. Stat. § 29-1819.02 in the context of post conviction cases filed by non-citizens who sought to have their convictions vacated because, they argued, trial courts did not comply with the statute's requirement that they give advisements regarding possible immigration consequences.

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[32] Fed. R. Crim. P. 11(b). *See also, United States v. Gonzalez*, 884 F.3d 457 (2d Cir. 2018).

[33] *State v. Hays*, 253 Neb. 467, 476-477, 570 N.W.2d 823, 829 (1997).

[34] In *People v. Peque*, 22 N.Y.3d 189 (2013), the New York Court of Appeals held that a court's duty to advise non-citizen criminal defendants of possible deportation consequences of guilty pleas does, in fact, have a constitutional dimension, both under the Fifth and Sixth Amendments. Other courts, however, disagree with *Peque*. *See, e.g., People v. Guzman*, 43 N.E.3d 954, 398 Ill.Dec. 44 (2015), where the Illinois Supreme Court held to the contrary. As a practical matter, if a trial court in Nebraska complies with Neb. Rev. Stat. § 29-1819.02, any Fifth Amendment obligation will likely be satisfied. So, at least in Nebraska or other states requiring a court advisement, whether by rule or by statute, this discussion is mostly academic.

[35] F. R. Crim. P. 11(b)(1)(O).

(a) *State v. Rodriguez-Torres*.

In *State v. Rodriguez-Torres*,[36] the Nebraska Supreme Court held that a defendant cannot use § 29-1819.02 to vacate a guilty plea that was entered before the effective date of the statute (July 20, 2002) once the defendant has completed his sentence:

> In § 29-1819.02, the Legislature gives a court discretion[37] to vacate a judgment or withdraw a plea where a court has failed to provide the advisement required for pleas made on or after July 20, 2002. It does not, however, convey upon a court jurisdiction to do so where a party has already completed his or her sentence. Nor has the Legislature in any other statute allowed for a specific procedure whereby a person who has been convicted of a crime and has already served his or her sentence may later bring a motion to withdraw his or her plea and vacate the judgment.[38]

The court held that, as a result, the trial court did not have subject matter jurisdiction over the defendant's motion and dismissed the appeal.

(b) *State v. Yos-Chiguil* (*Yos-Chiguil I*).

The next significant post conviction case in an immigration context came one year later. In *State v. Yos-Chiguil*[39] (*Yos-Chiguil I*), the defendant entered guilty pleas to one count of attempted second degree murder and one count of second degree assault in 2008. The trial court accepted the guilty pleas and sentenced the defendant.

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[36] 275 Neb. 363, 746 N.W.2d 686 (2008).

[37] This choice of words is curious, since the statute says if the advisement is not given and the requisite prejudice is shown, a trial court shall vacate the judgment and permit the defendant to withdraw his guilty or *nolo* plea if he files a motion to do so.

[38] *Id*. at 367, 746 N.W.2d at 689 (emphasis supplied).

[39] 278 Neb. 591, 772 N.W.2d 574 (2009).

After the judgment was final, but before the defendant had completed his sentence, he filed a motion requesting that the court vacate his guilty pleas pursuant to Neb. Rev. Stat. § 29-1819.02. He argued that, although the trial court gave him a general advisement regarding immigration consequences at the time he pled guilty, the advisement did not strictly comply with the statutory language. The trial court denied Yos-Chiguil's motion to withdraw his pleas and he appealed denial of the motion to the supreme court. As an initial matter, the State raised a subject matter jurisdiction argument, pointing to language in *Rodriguez-Torres*, and contended that since the judgment was final, statutory vacatur under § 29-1819.02 was not available to the defendant. In effect, the State argued that the statutory vacatur procedure is only available to a defendant on direct appeal.

The Nebraska Supreme Court held "that there is no language in the statute which would support such a limited construction."[40] As a result, the court held that the trial court had jurisdiction to consider a statutory vacatur motion raised by a defendant to whom the statute applies (i.e., one whose plea is entered on or after July 20, 2002), whose judgment is final, and who has not yet completed his sentence. The court also reiterated that the statute has a two-part test before a defendant is entitled to vacatur of a plea: (1) the defendant must show that the advisement was not given by the court and (2) the defendant must show there is a more than theoretical chance that he faces adverse immigration consequences. The second requirement was fatal to the defendant's claim in this case, the court held, because he produced no evidence showing that he actually faced adverse immigration consequences of any kind; he only argued that the advisement was not in strict compliance with the statute. That, the court held, was insufficient to trigger the vacatur provisions of the statute. The court held that a defendant seeking statutory vacatur must demonstrate that there is more than a merely hypothetical risk he will suffer negative immigration consequences.

The court did not decide whether the vacatur procedure under § 29-1819.02 is available to defendants who have completed their sentences. In *Rodriguez-Torres,* the

[40] *Id*. at 596, 772 N.W.2d at 579.

defendant also sought to use the statutory vacatur process – and only the statutory vacatur process – to withdraw a guilty plea that had been entered in 1997, long before the effective date of § 29-1819.02. The court in that case held the statute did not apply to such a plea. But in *Yos-Chiguil I*, the statute was in effect when the defendant entered his guilty plea in 2008. In an apparent retreat from its language in *Rodriguez-Torres, supra*, the court did not foreclose the possibility that statutory vacatur is available to defendants who have completed their sentences, but did not decide the issue because of the lack of evidence from the defendant on the issue of prejudice.[41]

The court also did not decide the issue of whether an advisement that does not parrot the statutory language requires vacatur of a guilty plea in cases where the defendant can show immigration-related prejudice. But, as indicated above, the court held that a defendant must show that he faces more than a hypothetical possibility of specific immigration prejudice in order to entitle him to vacate the judgment and withdraw his plea.

In *Yos-Chiguil I*, the trial court's advisement was: "If you are not a citizen of the United States, and if you are convicted of a crime, that conviction could adversely affect your ability to remain or work in this country."[42] Compare that to the statutory language: "If you are not a United States citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of removal from the United States, or denial of naturalization pursuant to the laws of the United States."[43] Those are very different advisements. The trial court's advisement in *Yos-Chiguil I* mentioned nothing about naturalization. But because the defendant did not show any prejudice of any type from a failure by the trial court to adhere strictly to the language of the statute, the court did not reach the issue of whether such a variance requires vacatur under § 28-1819.02. However, it did indicate that a defendant would have to show a nexus

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[41] *Id*. at 597, 772 N.W.2d at 579.

[42] *Id*. at 594, 772 N.W.2d at 578.

[43] Neb. Rev. Stat. § 29-1819.02.

between the faulty advisement and the immigration prejudice he faces:

> The Supreme Judicial Court of Massachusetts has construed similar statutory language to mean that "a defendant must demonstrate more than a hypothetical risk of such a consequence, but that he actually faces the prospect of it occurring." Applying this principle, the court held that a convicted defendant who faced deportation and was warned that deportation was a possible consequence of his guilty plea was not entitled to withdraw the plea on the ground that he was not also given a statutorily required warning that conviction could result in "'exclusion from admission to the United States.'" The court reasoned that although the advisement given by the trial court did not cover all the immigration consequences enumerated in the statute, it would not construe the statute to impose the "extraordinary remedy" of vacating the judgment of conviction "in circumstances where the inadequacy complained of is immaterial to the harm for which the remedy is sought". . . . We agree with the reasoning of the Massachusetts courts and hold that failure to give all or part of the advisement required by § 29-1819.02(1) regarding the immigration consequences of a guilty or nolo contendere plea is not alone sufficient to entitle a convicted defendant to have the conviction vacated and the plea withdrawn pursuant to § 9-1819.02(2). The defendant must also allege and show that he or she actually faces an immigration consequence which was not included in the advisement given.[44]

(c) *State v. Mena-Rivera*.

The defendant in *State v. Mena-Rivera*,[45] was a lawful permanent resident who pled guilty to a Class III felony child abuse charge. At the time of his arraignment and plea of not guilty, the court gave the defendant the advisement required by Neb. Rev. Stat. § 29-1819.02. The defendant later appeared before the court and, pursuant to a plea agreement, withdrew his not guilty plea and pled guilty to attempted child abuse, a Class IIIA felony. The court did not re-administer the statutory immigration

[44] *Yos-Chiguil I*, 278 Neb. at 597-598, 772 N.W.2d at 580 (citations omitted).

[45] 280 Neb. 948, 791 N.W.2d 613 (2010).

advisement at the hearing during which it accepted the defendant's guilty plea, but the defendant did acknowledge at his second hearing that the court had arraigned him previously and that he understood his rights. Around six months after the hearing at which the defendant pled guilty, and while he was still in state custody awaiting sentencing, he moved to withdraw his plea, alleging that because the court failed to re-read the immigration advisement at the plea hearing, he was entitled to withdraw his plea. The defendant also offered evidence at that hearing that he was the subject of an immigration detainer, meaning that Immigration and Customs Enforcement (ICE) had sent a notification to state authorities that it wished to be notified at the time the defendant was to be released from state custody. Such "ICE detainers" are routinely issued by ICE when they believe a state prisoner is removable from the United States.[46]

The trial court denied the defendant's motion to withdraw his plea pursuant to the statute, holding that he had not shown prejudice related to the court's failure to re-read the advisement to him, which is a requirement of the statute. The court then imposed sentence on the defendant related to his guilty plea. The defendant appealed the denial of his motion to withdraw his plea, and the Nebraska Supreme Court reversed, holding that the statute requires the trial court to give the immigration advisement to a defendant immediately before accepting his guilty plea. The court also held that, by introducing a copy of the ICE detainer that had been lodged against him, Mena-Rivera had sufficiently demonstrated that he may suffer adverse immigration consequences, which is all the statute requires.

(d) *State v. Yos-Chiguil* (*Yos-Chiguil II*).

In *State v. Yos-Chiguil*[47] (*Yos-Chiguil II*), the *pro se* defendant pursued a claim under the Nebraska Post-Conviction Act. (*Yos-Chiguil I* involved the same defendant's attempt to withdraw his guilty plea under the more specific statutory procedures in Neb. Rev. Stat. § 28-1819.02.) One of the main claims raised by Yos-Chiguil in this second case was that his trial counsel was deficient

[46] *See* section IV.C., *infra*, for a more detailed discussion of ICE detainers.

[47] 281 Neb. 618, 798 N.W.2d 832 (2011).

because he did not discuss with him the possibility of an intoxication defense to the charges Yos-Chiguil faced. Yos-Chiguil also claimed that trial counsel's performance was deficient because counsel failed to argue that § 28-1819.02 required strict adherence to the statutory language, as a matter of due process. In other words, one of his claims in this second case was a classic ineffective assistance of counsel Sixth Amendment claim, unlike the argument he made in *Yos-Chiguil I*, which was premised only on § 28-1819.02. But he also raised a Fifth Amendment due process claim directed at what he believed was the trial court's duty to advise him of immigration consequences of his guilty plea.

The trial court denied Yos-Chiguil an evidentiary hearing on his post conviction claims for various reasons, in two separate orders: one dated January 22, 2010, and one dated June 21, 2010. The Supreme Court held that Yos-Chiguil had not timely appealed the trial court's January 22 order, and that it therefore only had jurisdiction to consider the trial court's ruling on the June 21 order – that involving counsel's failure to advise him of the possibility of an intoxication defense. The court held that Yos-Chiguil should have been granted an evidentiary hearing on this issue, and reversed and remanded the case to the trial court.

There are two important features of the court's holding that relate to a trial court's duty to advise defendants of possible immigration consequences of *nolo* or guilty pleas. First, as to the Fifth Amendment due process issue, the court explicitly held that a criminal defendant does not have a constitutional right to have a court advise him of possible immigration consequences of a guilty plea.[48] Second, the court made clear that a vacatur motion filed under § 29-1819.02 can only relate to failure of a court to deliver the statutory advisement regarding possible immigration consequences of a guilty plea. Such a motion is not a proper vehicle to raise any other type of error regarding the plea process.

[48] *Id.* at 626, 798 N.W.2d at 840.

(e) *State v. Medina-Liborio* (*Medina-Liborio I*).

In *State v. Medina-Liborio*,[49] the Nebraska Court of Appeals, in an unreported decision, held that a statutory motion to vacate is the only proper vehicle for raising error when a trial court fails to deliver the advisement required by Neb. Rev. Stat. § 28-1819.02. In that case, the trial court did not give the statutory advisement at the time it accepted the guilty plea from the defendant. The defendant appealed the judgment of the trial court, alleging that the trial court abused its discretion by accepting his guilty plea without giving him the advisement. The Court of Appeals held that the only way to raise the non-advisement issue is by way of a motion to vacate the plea under the statutory provisions in § 28-1819.02. So although it affirmed the judgment of the trial court, it pointed out to the defendant that he could still seek a statutory vacatur under § 28-1819.02 if he wished to do so.

(f) *State v. Medina-Liborio* (*Medina-Liborio II*).

He did. But his motion was denied and he appealed. This time, his appeal was heard by the Nebraska Supreme Court in *State v. Medina-Liborio*.[50] At the hearing before the trial court, the State, over Medina-Liborio's objection, introduced evidence in the form of jail recordings that he had had conversations about the immigration consequences of his guilty plea with his family. His former counsel, also over objection, testified that he had discussed the possible immigration consequences of a guilty plea with Medina-Liborio. As the result of this evidence, the trial court held that the legislative intent of § 29-1819.02 had been satisfied since he was actually aware of the possible immigration consequences of his guilty plea, and denied Medina-Liborio's motion to vacate his plea. The Supreme Court reversed, holding that the plain language of the statute entitled Medina-Liborio to withdraw his guilty plea since he had met both elements of the statute. In response to the State's claim that such a holding would allow criminal defendants to "game the system," the court wrote:

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[49] 2011 WL 3615572 (2011).

[50] 285 Neb. 626, 829 N.W.2d 96 (2013).

> Finally, we do not share the district court's concern that applying § 29–1819.02 as it is written will somehow permit defendants to "game the system." The statute makes the trial judge responsible for giving the advisement. The prosecutor, in the interest of securing a valid plea-based conviction, also has a role in making certain that the advisement is given. A defendant can game the system only if both the court and the prosecutor fail to ensure that the defendant is afforded his or her statutory rights, i.e., actually given the advisement. If the advisement is given as the law requires, there is no game for a defendant to play.[51]

(g) *State v. Llerenas-Alvarado*.

In a decision handed down shortly before the Supreme Court's decision in *Medina-Liborio*, the Nebraska Court of Appeals, in *State v. Llerenas-Alvarado*,[52] held that the defendant had no right to withdraw his guilty plea under § 29-1819.02. Because the facts are akin to those in *Mena-Rivera, supra.*, they are reviewed in some detail here.

Llerenas-Alvarado was charged with kidnapping, a Class IA felony. Before his initial arraignment in county court, he was given a written advisory by an interpreter who read the advisory to him. The advisory included language that essentially advised Llerenas-Alvarado of possible immigration consequences of a guilty plea, in language very similar to that in § 29-1819.02. On June 7, he appeared before the county court and was advised of his rights, including the effect of conviction of noncitizens.[53] His case was then bound over to district court. On July 14, Llerenas-Alvarado appeared before the district court for a group arraignment. At that arraignment, the district court gave the advisement required by the statute. On August 29, Llerenas-Alvarado appeared again before the district

[51] *Id*. at 633-634, 829 N.W.2d at 101.

[52] 20 Neb. App. 585, 827 N.W.2d 518 (2013).

[53] The opinion does not elaborate on the language used, so it is unclear if the statutory advisement was given to Llerenas-Alvarado in the language required by the statute.

court for a pretrial conference. Pursuant to a plea agreement, the State was granted leave to file an amended information, but withdrew it because Llerenas-Alvarado was not ready to enter a plea to the amended information. On September 1, the parties again appeared before the district court and indicated they had reached a plea agreement. The district court asked Llerenas-Alvarado if he remembered the court explaining his rights to him on July 14, and asked if he wanted the court to repeat that information. He said he did recall that court date and that he did not wish to have any of the information repeated to him, including "the possibility of deportation from the United States." The court then continued the hearing until the following day, September 2, at which time it accepted Llerenas-Alvarado's guilty plea. The court did not repeat the statutory immigration advisement at the September 2 hearing.

Before the date for sentencing, Llerenas-Alvarado filed a motion to withdraw his guilty plea, based on the failure of the court to give the statutory advisement. A hearing on his motion was held in the district court on November 18. The district court denied his motion to vacate and Llerenas-Alvarado appealed. On appeal, he raised two arguments: (1) that his plea was not knowingly and voluntarily entered (in essence, a Fifth Amendment argument) and (2) that the statutory advisement was not timely given to him as required under the *Mena-Rivera* opinion.

Llerenas-Alvarado's Fifth Amendment argument was not based on the fact that the trial court failed to advise him of the possible immigration consequences of his guilty plea. Instead, it dealt more with his contention that the court failed to adequately examine him to determine if he understood his rights and, specifically, that he had difficulty understanding his rights because, among other things, he required the assistance of an interpreter. The Court of Appeals held that the record did not support this claim. As to his claim that the statutory immigration advisement was not given to him immediately prior to the entry of his guilty plea, as required by *Mena-Rivera*, the Court of Appeals held that, although Llerenas-Alvarado had not been given the complete immigration advisement on either September 1 or 2, he had waived his statutory right to receive the advisement and therefore "the

legislative intent of the statute [was] not frustrated in this case."[54]

Given the strict way in which the Nebraska Supreme Court has interpreted the provisions of § 29-1819.02, one wonders about the holding in this case. The facts certainly did not help Llerenas-Alvarado, given that he refused the court's request to repeat its advisements just prior to taking his plea. On the other hand, the statute, as interpreted by *Mena-Rivera*, is exacting in its requirements. One senses that this was a close call.

(h) *State v. Rodriguez.*

The Supreme Court next considered § 29-1819.02 in *State v. Rodriguez*.[55] The precise issue in this case was whether a trial court has subject matter jurisdiction to hear a motion by a defendant to withdraw his guilty plea even after he has completed his sentence related to the guilty plea. The Supreme Court held that a trial court does, in fact, have subject matter jurisdiction to hear such a motion. In order to reach this conclusion, however, the Supreme Court had to deal with some troubling language in its own *Rodriguez-Torres* opinion from 2008 (discussed above). That opinion stated, *inter alia*:

> In § 29-1819.02, the Legislature gives a court discretion to vacate a judgment or withdraw a plea where a court has failed to provide the advisement required for pleas made on or after July 20, 2002. **It does not, however, convey upon a court jurisdiction to do so where a party has already completed his or her sentence**.[56]

The Supreme Court attempted to dispatch this language, which is obviously inconsistent with the result it reached in this case, on a couple of theories: (1) *Rodriguez-Torres* dealt with a pre-July 20, 2002 plea and (2) the language

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[54] *Id*. at 596, 827 N.W.2d at 526.

[55] 288 Neb. 714, 850 N.W.2d 788 (2014).

[56] *Rodriguez-Torres,* 275 Neb. at 367, 746 N.W.2d at 689 (emphasis supplied).

was dictum. Ultimately, however, the court distanced itself from the language:

> To the extent that our statement in *Rodriguez-Torres* can be interpreted to limit the relief provided in § 29-1819.02 to a defendant whose sentence has not been completed, such interpretation is expressly disapproved.[57]

There is another interesting issue presented by this case, however, that was first raised in the *Yos-Chiguil* cases – an issue that has not yet been resolved by the Nebraska Supreme Court. If a trial court's advisement does not conform exactly to the statutory language, does that mean that the advisement has not been given as required by the statute, and that a defendant therefore has a right to withdraw a guilty plea, provided the other elements of the statute are met? The court did not have to address that issue directly in *Yos-Chiguil*, and in this case the court simply remanded the issue to the trial court, having found that it had subject matter jurisdiction to hear the motion to vacate.[58] Justice Cassel, in his concurrence, hinted that the Supreme Court would not look favorably on an advisement that does not track the statutory language:

> I write separately only to make plain an important matter inherent in the court's opinion. There is no excuse for failing to administer the statutory advisement. It takes only a moment. The wording is succinct. The statute specifies the precise language. Judges have no reason to improvise or summarize. The "cost" of timely giving advisements is minuscule compared to the "benefit" of avoiding plea withdrawals years after the resulting judgments have been fully executed. Judges should fully and timely comply with

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[57] *Rodriguez,* 288 Neb. at 723, 850 N.W.2d at 794.

[58] According to a Justice search, on remand the district court did allow Mr. Rodriguez to withdraw his guilty plea, but the basis for the trial court's ruling is not set forth in its order. However, one must assume that the basis for the ruling is that the text of the court's advisement did not conform exactly to the language of the statute.

> the statutory mandate. And the practicing bar should ensure that judges do so.[59]

Although not of constitutional dimension, this opinion, and the shot across the bow from Justice Cassel contained in it, echo the language used by Justice Stevens in *Padilla*, which is that the responsibility for seeing that the Sixth Amendment's requirement of competent counsel is complied with is the responsibility of not only defense counsel, but also the prosecutor and the judge.[60] Justice Cassel's language makes it clear that all participants in a criminal proceeding have an interest in seeing that § 29-1819.02 is complied with.

(i) *State v. Gach*.

In this case[61], the Supreme Court built on its holdings in *Yos-Chiguil I* and *Mena-Rivera* in denying post conviction relief to the non-citizen defendant, who filed a claim to withdraw his guilty plea under § 29-1819.02, arguing that the trial court's advisement did not exactly track the statutory language.

The trial court's advisement certainly did not track the statutory language:

> [Deputy county attorney]: Your Honor, before I give the factual basis I just remind the Court that perhaps before [Gach] entered the plea you could do the immigration advisory, of any potential impact on that. Would you like me to do that or would you like to do the —
>
> THE COURT: Let me do that right now, sir. In addition to the penalty of 1 to 50 years' imprisonment, 50 being the max, one year being the minimum, your immigration status with the United States could be affected. Do you understand that, sir?

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[59] *Id*. at 727, 850 N.W.2d at 796-797.

[60] *Padilla,* 559 U.S. at 373.

[61] 297 Neb. 96, 898 N.W.2d 360 (2017).

> [Gach]: (No response.)
>
> THE COURT: In other words — do you understand that?
>
> [Gach]: Yes.
>
> THE COURT: In other words, you could be deported. . . . Do you understand that?
>
> [Gach]: Yes.

In his post conviction claim, the defendant argued that he should be allowed to withdraw his plea, since ICE had lodged a detainer against him and was seeking to remove him from the United States. At the post conviction hearing before the trial court, the parties stipulated that the defendant was not a U.S. citizen either at the time of the plea hearing or at the time of the post conviction hearing.

The Supreme Court, in affirming the trial court's denial of the motion to vacate the guilty plea, held, following its holding in *Yos-Chiguil I*, that the defendant had not carried his burden to show that he actually faced an immigration consequence that was not included in the advisement actually given by the trial court. The court held that, although the advisement given by the trial court did not track the statutory language, it did fairly advise the defendant that his guilty plea could result in his "deportation" from the United States and that the failure of the trial court to also advise him that it could affect his ability to naturalize was not a material omission.

The court did not address the issue of whether the trial court's failure to track exactly the statutory language in § 29-1819.02 was sufficient to allow a defendant to vacate a plea under the statute, given its holding that Gach did not carry his burden on the second element under the statute. But the court did mention, again, Justice Cassel's concurrence in *State v. Rodriguez* about the importance of giving the verbatim advisement.[62] And, given the court's

[62] The Court also stated, as a general principle of law, that the right to withdraw a plea previously entered is not absolute, and then cites to a case (*State v. Ortega*, 290 Neb. 172 (2015)) that was not decided under § 29-1819.02. That general statement of law appears to be incorrect

holding that the defendant had carried his burden of proof on the first element of his claim – that the trial court failed to give "all or part of" the advisement required by the statute[63] – it seems unlikely that anything other than a verbatim recitation of the statutory language will suffice.

(j) *State v. Garcia*.

In *State v. Garcia*,[64] the Nebraska Supreme Court confronted an argument by the defendant that asserted § 29-1819.02 was not complied with because a key word in the advisement was not properly interpreted into Spanish, the defendant's primary language.

The court held that there is nothing in the language of the statute itself that requires correct interpretation of the statutory advisement:

> Indeed, if we were to find that § 29-1819.02(2) allows for the withdrawal of a plea based on inadequate translation, we would have to read *substantial* content into the statute that does not appear in its text. Were we to hold that the statute extends to translation inadequacies, subsidiary questions such as when is translation required, by what standards are alleged translation errors to be evaluated, and by what evidence are they to be proved would inevitably follow. There is nothing in the text of the statute that addresses those questions, and we are neither well-equipped nor authorized to develop answers to them on our own. See, Neb. Const. art. II, § 1; *Heckman v. Marchio*, 296 Neb. 458, 466, 894 N.W.2d 296, 302 (2017) (explaining that " 'judicial legislation' " violates article II, § 1, of the Nebraska Constitution).

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when applied to post conviction claims brought under § 29-1819.02, which states that, if the defendant carries his burden under both prongs of the statute, the trial court shall vacate the judgment of conviction.

[63] *Id*. at 102, 898 N.W.2d at 364.

[64] 301 Neb. 912, 920 N.W.2d 708 (2018).

Id. at 922-923; 920 N.W.2d at 715. And although, at oral argument, Garcia contended that the inaccurate translation violated his due process rights, the court did not reach that argument because Garcia had not raised it in his motion to vacate. So the holding of the court on the statutory basis was, in effect, if the advisement is given correctly in English to a defendant, the statute has been satisfied, even if the translation might not have been accurate. Any complaint about the accuracy of translation is a due process, and not a statutory, argument.

c. History of Duty of Counsel to Advise.

(1) *Strickland v. Washington*.

In *Strickland v. Washington*,[65] the U.S. Supreme Court delineated standards and factors courts must apply to determine whether or not a criminal defendant has received the level of effective assistance of counsel required by the Sixth Amendment. The Court imposed a two-pronged test: first, courts must consider whether trial counsel's performance was deficient; second, courts must decide, in the event the performance was deficient, whether such deficient performance prejudiced the defendant and therefore deprived him or her of a fair trial. If a defendant can prove up on both elements, they state an ineffective assistance of counsel (IAC) claim that opens up post conviction remedies.

(2) *Padilla v. Kentucky*.

On March 31, 2010, much of the previous jurisprudence in this area was drastically altered by the Supreme Court's decision in *Padilla, supra*.

Mr. Padilla, the petitioner, a nearly 40-year lawful permanent resident of the United States and Vietnam veteran, was charged with transporting around 1000 pounds of marijuana in a commercial truck. After some skirmishing about whether or not Padilla had validly consented to a search of the truck, he pled guilty to three state crimes, the most serious of which was a drug trafficking offense, a felony under Kentucky law. Padilla was sentenced to five years' imprisonment followed by five years' probation. Nearly two years after sentencing, Padilla filed a *pro se* collateral attack on his conviction, alleging that his trial counsel was ineffective because counsel had failed to investigate and advise him of the potential immigration consequences of his guilty pleas. Padilla alleged that trial counsel had told him that he did

[65] 466 U.S. 668 (1984).

not need to worry about any immigration consequences of the guilty pleas, because of the length of time he had been in the U.S. He also alleged that, had he known of the potential immigration consequences of the guilty pleas, he would not have pled guilty.

The advice given to Padilla by his criminal defense counsel was clearly wrong. Not only does a drug trafficking conviction have an effect on a non-citizen's legal status, it has one of the most detrimental effects possible. In fact, a drug trafficking offense such as the one to which Padilla pled guilty is an aggravated felony.[66] That not only made Padilla deportable, it barred him from qualifying for nearly every type of relief from removal that might otherwise be available to him. So the affirmative advice offered by criminal defense counsel was about as incorrect as it could be. Nevertheless, a majority of the Kentucky Supreme Court held that, because immigration consequences are "collateral" to criminal proceedings, Padilla could not prevail on his *Strickland* challenge. In so ruling, the Kentucky Supreme Court held that there was no constitutional defect in trial counsel's advice on a collateral matter even when that advice was legally incorrect.

The Supreme Court granted certiorari on two questions:

> 1. Whether defense counsel, in order to provide the effective assistance guaranteed by the Sixth Amendment, has a duty to investigate and advise a non-citizen defendant whether the offense to which the defendant is pleading guilty will result in removal.
>
> 2. Whether petitioner's counsel provided ineffective assistance of counsel by affirmatively misadvising petitioner concerning the likelihood of removal upon the entry of his guilty plea.

Justice Stevens wrote the majority opinion for the Court, in which Justices Kennedy, Ginsburg, Breyer, and Sotomayor joined. Justices Alito and Roberts concurred in the judgment, while Justices Scalia and Thomas dissented.

The Court held that the Sixth Amendment requires criminal defense counsel to inform his or her non-U.S. citizen client whether or not a contemplated guilty plea carries a risk of deportation. The Court also held that constitutionally competent counsel would have advised Padilla that his drug conviction made

[66] 8 U.S.C. § 1101(a)(43)(B).

him subject to automatic deportation. Finally, the Court remanded the case to the Kentucky Supreme Court so it could determine whether or not Padilla could demonstrate prejudice under *Stickland's* second prong.

In reaching its holding, the Court made several noteworthy observations. First, the Court held that it need not determine whether deportation consequences are "collateral" to criminal proceedings, since it found that deportation is an integral part of the **penalty** imposed on non-citizen defendants.[67] This is so, the Court held, because of various amendments to the Immigration and Nationality Act since the early 1990's that have restricted nearly every form of relief from deportation that was once available to non-citizens facing removal from the U.S. So it is now beyond dispute that at least immigration consequences are not "collateral"consequences for criminal proceedings for Sixth Amendment purposes.

Second, the Court rejected a rule, which the concurrence would have adopted, that would hold only affirmative mis-advice can serve as the basis for an ineffective assistance of counsel claim. The Court reasoned that such a rule would "give counsel an incentive to remain silent on matters of great importance, even when answers are readily available," and "would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available."[68]

Third, the Court dismissed any concerns that its new rule would open the floodgates to collateral attacks of convictions in which defendants were not advised of potential immigration consequences of guilty pleas.

The Court wrote that it had confronted a similar argument in *Stickland* itself but "[a] flood did not follow in that decision's wake."[69] In addition, the Court pointed out, in order to prevail on *Strickland's* prejudice prong, a defendant must convince a court that a decision to reject the plea bargain would have been rational under the circumstances, not an easy hurdle to clear.

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[67] 559 U.S. at 364.

[68] *Id.* at 370.

[69] *Id.* at 371-372.

Finally, the Court wrote, "It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains. For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea. We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty."[70]

This last point is significant. As the Court later expands upon in the opinion, the "professional norms" it refers to are likely to be the template for counsel in deciding what type of immigration-related advice they will need to give to their non-citizen clients contemplating guilty pleas.

As to how detailed counsel's immigration advice must be, the Court adopted a sliding scale test. At a minimum, counsel must advise his or her client that a pending criminal charge may carry a risk of adverse immigration consequences.[71] However, in "obvious" cases such as Padilla's, counsel must advise the client that a guilty plea would make him deportable.[72] This, of course, begs the question of how detailed immigration advice must be in those cases that fall between "difficult" and "easy." How is counsel to figure this out?

Part of the answer comes from the Court's discussion and review of "prevailing norms of practice." The Court states that such norms are guides to determining whether counsel's advice is competent in any given case. And, the Court points out, the weight of these norms is to advise the client "regarding the risk of deportation,"[73] which goes much farther than simply advising a client that there may be adverse immigration consequences to a guilty plea. This interpretation is bolstered by the concurrence, whose rule would have only required counsel to advise a client that there could be adverse immigration consequences to a guilty plea, something akin to the advisement required to be given by courts under Neb. Rev. Stat. § 29-1819.02. The concurrence laments

[70] *Id.* at 372.

[71] *Id.* at 369.

[72] *Id.* at 360.

[73] *Id.* at 367.

that the majority goes too far in what it requires.[74] That lament signals that what the majority requires is something more than just "you might be in trouble with Immigration if you plead guilty."[75]

A look at some of the "professional norms" mentioned by the Court further supports this interpretation. For example, the ABA Standards for Criminal Justice, Pleas of Guilty, § 14-3.2(f), states:

> To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.

The commentary to this section is even more explicit in its exhortation:

> For example, depending on the jurisdiction, it may well be that many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction. To reflect this reality, counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client.

(3) Post-*Padilla* Cases.

There have been a number of post-*Padilla* cases decided by both the United States Supreme Court and various state courts around the country, applying the lessons of *Padilla* to various legal and factual settings. Those cases will be discussed later in this outline in the context of the legal issues they raise and resolve.[76]

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[74] *Id.* at 375-376.

[75] The Iowa Supreme Court has held that, where the crime with which a criminal defendant is charged clearly involves immigration consequences, then defense counsel has a Sixth Amendment obligation to inform the defendant of all possible immigration consequences of such a conviction. *Diaz v. State*, 896 N.W.2d 723, 732 (Iowa 2017). *See* further discussion of this case at section I.D.2.c.(3)(d), *infra.*

[76] For example, I discuss the *Descamps* case decided by the U.S. Supreme Court in 2013 in the context of determining whether a statute is "divisible" for purposes of applying the categorical analysis. *See* section V.C.3.b.(8), *infra*.

However, at this point, it is worth discussing four major post-*Padilla* cases: *Chaidez v. United States,*[77] the disposition of *Padilla* on remand to the Kentucky state courts,[78] *Lee v. United States*,[79] and *Diaz v. State*,[80] an Iowa supreme court case that expounds and expands on defense counsel's Sixth Amendment obligations in light of *Padilla*.

(a) *Chaidez v. United States*.

Before this case was decided in 2013, Courts of Appeal across the U.S. were split on whether *Padilla* was effective retroactively; that is, whether it applied to cases that took place before March 31, 2010.[81] In a 7-2 opinion written by Justice Kagan, the U.S. Supreme Court held that, under the *Teague v. Lane*[82] test, *Padilla* does not operate retroactively.

Interestingly, however, that is not necessarily the end of the story. It is the end of the story, of course, if one is talking about retroactivity under a federal constitutional analysis. However, other state courts have held, as a matter of state constitutional principles, that *Padilla* does have a retroactive effect when analyzed under state law.[83] The analysis of these state courts varies, but the authority for a state court to apply its own retroactivity analysis is rooted in the case of *Danforth v. Minnesota*,[84] which held that the *Teague* rule does not constrain the authority of state courts to give broader effect to new rules of criminal procedure than is required by federal law.

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[77] 568 U.S. 342 (2013).

[78] *Padilla v. Commonwealth*, 381 S.W.3d 322, 329 (Ky. Ct. App. 2012).

[79] 137 S.Ct. 1958, 198 L.Ed.2d 476 (2017).

[80] 896 N.W.2d 723 (Iowa 2017).

[81] *Chaidez*, 568 U.S. at 347, footnote 2.

[82] 489 U.S. 288 (1989).

[83] *See, e.g., Ramirez v. State*, 333 P.3d 240 (NM 2014); *Commonwealth v. Sylvain*, 466 Mass. 422, 995 N.E.2d 760 (2013).

[84] 552 U.S. 264 (2008).

The New Mexico Supreme Court's opinion in *Ramirez* is particularly interesting, since it relied primarily on the fact that, since 1990, a court rule required that New Mexico courts and practitioners had to ascertain if defendants understood possible immigration consequences of guilty pleas. As the New Mexico Supreme Court pointed out:

> Unlike the federal system, since 1990 New Mexico has required attorneys in all trial courts to advise their clients of the details of the plea colloquy. [The Supreme Court form] was amended in 1990 to, among other things, require the judge to advise the defendant that a conviction may have an effect on the defendant's immigration status. [The form], applicable to all New Mexico trial courts, also obligated the attorney to certify having explained the plea colloquy to the client in detail.[85]

Because of this fact, the New Mexico Supreme Court had no problem in holding that, in New Mexico state courts, *Padilla* did apply retroactively, since a professional standard of conduct had been established under state law that pre-dated *Padilla* by 20 years.

The Massachusetts Supreme Court took a different route to arrive at its decision that *Padilla* applies retroactively.[86] The Court began by pointing out that, prior to the U.S. Supreme Court's decision in *Chaidez*, it had held that *Padilla* was effective retroactively.[87] But it revisited that decision in the wake of the *Chaidez* decision. The *Sylvain* opinion held that the U.S. Supreme Court, post-*Teague*, has adopted a rule about what constitutes a "new rule" that expands what *Teague* originally imagined:

> Although we consider the retroactivity framework established in *Teague* to be sound in principle, the Supreme Court's post-*Teague* expansion of what qualifies as a

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[85] *Ramirez*, 333 P.3d at 244.

[86] *Commonwealth v. Sylvain*, 466 Mass. 422, 995 N.E.2d 760 (2013).

[87] *Commonwealth v. Clarke*, 460 Mass. 30, 949 N.E.2d 892 (2011).

> "new" rule has become so broad that decisions defining a constitutional safeguard rarely merit application on collateral review.[88]

As a result, the Massachusetts Supreme Court refused to follow *Chaidez* and concluded that *Padilla* did not, in fact, establish a "new rule."[89]

The Nebraska Supreme Court, citing *Chaidez*, has held that *Padilla* does not apply retroactively.[90] But the issue was not squarely raised or briefed by the parties in the case, and the analysis by the Nebraska Supreme Court was not as detailed as that of either the Massachusetts or New Mexico Supreme Courts, nor did it appear to address the issue in a *Danforth* context. As a result, this issue may still be an open one, as a matter of state law, in Nebraska.

The rationale used by the New Mexico Supreme Court might get some traction in Nebraska. Using that general rationale, the Washington Supreme Court, in *In re Yung-Cheng Tsai*,[91] held that *Padilla* is retroactive as a matter of state law because, since 1983, Washington has had a statute requiring that a non-citizen criminal defendant be warned about immigration consequences before pleading guilty. That statute took the form of a standard plea form that all criminal defendants, their lawyers, and prosecutors must sign at the time the court is asked to accept a guilty plea. One of the advisements in the form reads a lot like § 29-1819.02:

> If I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the

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[88] *Sylvain*, 466 Mass. at 433, 995 N.E.2d at 769.

[89] The Court of Appeals of New York agreed with the holding in *Chaidez* in *People v. Baret*, 23 N.Y.3d 777, 16 N.E.3d 1216, 992 N.Y.S.2d 738 (2014). However, the decision was 3-2, and both the majority and dissent do an excellent job of laying out the arguments both for and against retroactive application of *Padilla* under a *Danforth*-type analysis.

[90] *State v. Osorio*, 286 Neb. 384, 837 N.W.2d 66 (2013).

[91] 183 Wash.2d 91, 351 P.3d 138 (2015).

United States, or denial of naturalization pursuant to the laws of the United States.

The Washington Supreme Court held that the existence of this form – and the language regarding possible immigration consequences contained within it – give non-citizen defendants the "unequivocal right to advice regarding immigration consequences and necessarily imposes a correlative duty on defense counsel to ensure that advice is provided."[92] And, the failure of a lawyer to investigate the potential immigration consequences of a plea, without any tactical purpose, is constitutionally deficient performance by the lawyer.[93] Therefore, given the existence of the statute (and court form) since 1983, the Washington Supreme Court held that *Padilla* is a garden variety application of the *Strickland* test that simply refines the scope of defense counsel's constitutional duties to the client.[94]

Wouldn't the same hold true in Nebraska, at least since § 29-1819.02 came into existence in July, 2002? Since that time, all Nebraska courts and practitioners have been aware that it is the intent of the Legislature that a criminal defendant entering a guilty plea be advised by the court that such a plea may have immigration consequences. The Washington statute reads very similar to the Nebraska statute.[95] A competent defense lawyer in Nebraska, at least since July, 2002, is aware of a non-citizen criminal defendant's right to be advised that a plea may carry negative immigration consequences and, therefore, the lawyer should have a correlative duty to advise a non-citizen defendant of possible immigration consequences of a guilty plea. And to that extent, *Padilla* did not impose a

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[92] *Id*. at 101, 351 P.3d at 143.

[93] *Id*. at 102, 351 P.3d at 144.

[94] *Id*. at 103, 351 P.3d at 144.

[95] *Compare* RCWA 10.40.200(2) with § 29-1819.02:

> Prior to acceptance of a plea of guilty to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall determine that the defendant has been advised of the following potential consequences of conviction for a defendant who is not a citizen of the United States: Deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

"new rule" for purposes of the *Teague* analysis. Or so the argument goes.

(b) *Padilla* on Remand.

As discussed earlier, the *Strickland* test regarding ineffective assistance of counsel claims is two-fold: (1) whether the assistance of counsel falls below an objective standard of reasonableness and (2) if so, whether the client suffered prejudice as a result of deficient performance by counsel. The *Padilla* decision by the Supreme Court decided the first *Strickland* issue, but remanded the case to the Kentucky state courts on the prejudice issue because they had not had a chance to engage in the prejudice analysis.

On remand, Mr. Padilla argued that he was prejudiced by counsel's deficient performance because, had he been advised of the immigration consequences of his guilty plea, he would not have pled guilty but would have insisted on going to trial. However, that subjective argument is not, by itself, sufficient to prevail on the *Strickland* prejudice prong. Instead, one must show that the decision to reject a plea offer and proceed to trial would have been objectively reasonable under the circumstances.[96] The Kentucky trial court held that Mr. Padilla had not shown prejudice because a decision to proceed to trial would not have been reasonable under the circumstances. Padilla appealed to the Kentucky Court of Appeals, which reversed the trial court's holding and determined that Mr. Padilla had, in fact, produced evidence sufficient to meet his burden to show prejudice.

In so holding, the Kentucky Court of Appeals, citing the Third Circuit in *United States v. Orocio*,[97] stressed how the calculus in decisions in cases involving immigration consequences are different from those in cases that do not involve immigration consequences:

> For the [non-citizen] defendant most concerned with remaining in the United States. . . it is not at all unreasonable to go to

[96] *Hill v. Lockhart*, 474 U.S. 52 (1985).

[97] 645 F.3d 630 (2011).

> trial and risk a ten-year sentence and guaranteed removal, but with the chance of acquittal and the right to remain in the United States, instead of pleading guilty to an offense that, while not an aggravated felony, carries "presumptively mandatory" removal consequences. . . .
>
> Likewise, we conclude that although not the exclusive factor when determining whether a particular defendant's decision to insist on a trial would have been rational, the immigration consequences of a guilty plea can be the predominate factor.[98]

(c) *Lee v. United States*.

The Kentucky Court of Appeals' reasoning in the *Padilla* case on remand was vindicated by the U.S. Supreme Court in *Lee v. United States*[99] In that case, a criminal defendant was charged with a drug trafficking offense, which amounted to an aggravated felony. The defendant was a long-time legal permanent resident (LPR) who had lived in the United States for 35 years and who had never been back to his country of nationality since coming to the U.S. After being charged with the drug trafficking crime, he repeatedly asked his criminal defense counsel if he should be worried about possible immigration consequences of the charge, as well as the possible immigration consequences of the plea deal that the prosecution was offering him. And his criminal defense counsel repeatedly (and erroneously) told him no, that he had nothing to worry about regarding possible immigration consequences.

As a result, Mr. Lee agreed to plead guilty to a charge that turned out to be an aggravated felony drug trafficking offense. Once he found out that such a conviction had severe negative immigration consequences, he filed a motion to vacate his conviction, arguing that his counsel had provided constitutionally ineffective assistance of counsel. Both the trial court and appellate court held that Mr. Lee had demonstrated that his counsel was ineffective

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[98] *Padilla v. Commonwealth*, 381 S.W.3d at 329 (internal citations omitted).

[99] 137 S. Ct. 1958 (2017).

under the *Strickland* analysis, but further held that, because the evidence against him was very strong, he could not show that he had suffered prejudice as a result of his counsel's incorrect advice.

The Supreme Court disagreed. After reiterating that a criminal defendant is entitled to constitutionally competent representation even at the plea-bargaining stage, the Court held that the usual test on prejudice, which is whether, but for counsel's unprofessional errors, the result of the criminal proceeding would have been different, was inapplicable in a case where a plea deal was struck. In such a case, the Court said, the focus when analyzing *Strickland's* prejudice prong is whether the ineffective assistance of counsel led to a forfeiture of the proceeding itself.[100] Therefore, the proper test is whether the defendant can demonstrate a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial.

The government contended that Lee could not prevail on the prejudice prong unless he could demonstrate that he would have been better off going to trial. Further, the government contended that, given the overwhelming evidence of Lee's guilt, there was no possible way for him to make this showing in his case.

The Supreme Court held that was not the proper focus. Instead, the focus should be on whether it was reasonable for Lee, given his overwhelming concern about the possible immigration consequences of his plea, to insist on going to trial even in the face of the strong evidence against him. The calculus, the Court held, must include an objective inquiry, under the particular facts and circumstances of this case, of whether, given the totality of the circumstances, a decision to reject the plea offer was rational.

> We cannot agree that it would be irrational for a defendant in Lee's position to reject the plea offer in favor of trial. But for his attorney's incompetence, Lee would have known that accepting the plea agreement would *certainly* lead to deportation. Going to trial? *Almost* certainly. If deportation

[100] *Id*. at 1965.

> were the ‘‘determinative issue’’ for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this country and no other, as did Lee; and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that ‘‘almost’’ could make all the difference. Balanced against holding on to some chance of avoiding deportation was a year or two more of prison time. Not everyone in Lee's position would make the choice to reject the plea. But we cannot say it would be irrational to do so.[101]

(d) *Diaz v. State*.

The Iowa Supreme Court decided a major case in 2017 regarding defense counsel's Sixth Amendment obligations in light of *Padilla*. Although the decision is not binding on Nebraska courts, the decision did come from our next-door neighbor, and is examined for the reason that it might have some persuasive value in Nebraska.

Mr. Morales Diaz was an undocumented immigrant who, at the time of the events in the case, had been living in the United States since 2002. He had a young daughter who was a U.S. citizen. Until he was taken into custody by ICE, he was her primary caregiver. Mr. Morales Diaz was charged with forgery (a class "D" felony under Iowa law) as a result of possessing a Texas identification card that he bought on the street, which he admitted was not a legitimate document.

After consulting with his criminal defense lawyer, Mr. Morales Diaz agreed to plead guilty to an aggravated misdemeanor forgery under Iowa Code section 715A.2(2)(b). Defense counsel told Mr. Morales Diaz that he was "probably going to be deported to Mexico no matter what happened," both because he was undocumented in the U.S. and because he had previously missed a hearing in Immigration Court. As a result of his criminal conviction, Mr. Morales Diaz was removed to Mexico. However, he returned to the U.S. in custody of the Department of

[101] *Id*. at 1968-1969.

Homeland Security and filed a post conviction claim in which he alleged his criminal defense counsel was ineffective under a *Strickland* analysis for failing to advise him of the immigration consequences of his guilty plea.

In a remarkable opinion, the court granted Morales Diaz's post conviction claim, holding that he met both *Strickland* prongs: deficient performance by trial counsel and resulting prejudice. The court also held:

> · Counsel's duty to advise a criminal defendant of immigration consequences exists separate and apart from the colloquy engaged in by a trial court under Iowa Rule of Criminal Procedure 2.8.[102]
>
> · Counsel has a duty, under *Padilla*, to advise noncitizen defendants whether a conviction of a crime "is also a crime that renders a noncitizen deportable."[103]
>
> · Once it is clear that conviction of a particular offense will result in immigration consequences, defense counsel must advise the defendant not only that immigration consequences will follow, but precisely what those consequences will be. Such consequences not only relate to the likelihood of deportation, but also to unavailability of relief from removal (such as eligibility for cancellation of removal), grounds of inadmissibility, and the likelihood of mandatory detention by ICE.[104]
>
> The Iowa supreme court recognized that these duties are burdensome, but, referring to the ABA Standards for Criminal

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[102] The text of that Rule states that a trial court must address the defendant in open court and, *inter alia*, make certain that the defendant is aware "that a criminal conviction, deferred judgment, or deferred sentence may affect a defendant's status under federal immigration laws." Compare this language with the language in Neb. Rev. Stat. § 29-1819.02, *supra*.

[103] *Diaz,* 896 N.W.2d at 729.

[104] *Id*. at 732.

> Justice,[105] said "we do not find them too onerous a burden to place on the professional advisers employed to represent their clients' best interests."[106]
>
> The court said that, in its opinion, *Padilla* did not alter the standard to which defense counsel is held. "Instead, counsel after *Padilla* is held to the same standard counsel was before *Padilla*: to provide objectively reasonable assistance as measured by prevailing professional norms."[107]

(4) Post-*Padilla* Nebraska Cases.

The Nebraska Supreme Court has decided a number of post conviction cases in which defendants argued that their criminal defense lawyers were ineffective because they did not advise the defendants of immigration consequences of guilty pleas they entered. Those decisions are reviewed below.

(a) *State v. Gonzalez.*

State v. Gonzalez[108] is the seminal case in this area. The defendant in that case was undocumented. As a result of her not having any immigration status, Gonzalez was placed into removal proceedings by Immigration and Customs Enforcement in late 2006. In 2007, while those immigration proceedings were still pending, she was charged with fraudulently receiving public assistance benefits, a Class IV felony. She was initially arraigned in early 2008, and pled not guilty. Two months later, she withdrew her not guilty plea and entered a plea of no contest to the charge, in exchange for the State's agreement to recommend a sentence of probation. She also agreed to pay restitution in the amount of $18,522, the amount of benefits unlawfully obtained by her. The trial court gave Gonzalez the statutory advisement in Neb. Rev. Stat. § 29-

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[105] Particularly 4-5.5 (4th ed. 2015).

[106] *Diaz*, 896 N.W.2d at 731.

[107] *Id*. at 730.

[108] 283 Neb. 1, 807, N.W.2d 759 (2012).

1819.02 both at the time of her arraignment and at the time of the entry of her no contest plea. The court accepted her no contest plea and sentenced her to a term of 5 years' probation.

Her conviction made Gonzalez ineligible for a type of relief from removal, specifically, cancellation of removal for certain non-permanent residents under 8 U.S.C. § 1229b(b). The conviction made her ineligible for cancellation of removal both because it was a "crime involving moral turpitude" under 8 U.S.C. § 1227(a)(2)(A)(i) and because it was an "aggravated felony" under 8 U.S.C. § 1227(a)(2)(A)(iii) (specifically, the offense was an aggravated felony because of 8 U.S.C. § 1101(a)(43)(M)(I), which states that a crime involving fraud or deceit in which the loss to the victim exceeds $10,000 is an aggravated felony).

As a result, in July 2010, over two years after she was convicted, but while she was still in state custody pursuant to her conviction, Gonzalez filed a "Motion to Withdraw Plea and Vacate Judgment," alleging she had received ineffective assistance of counsel because her criminal defense lawyer had not told her that conviction of the charge to which she pled no contest would bar her from qualifying for cancellation of removal. Gonzalez's testimony at the hearing on her motion to withdraw her plea revealed that she had only learned of this immigration consequence about five months before filing her motion, and only then because she was consulting with a different lawyer who advised her of this consequence. The trial court denied her motion, finding that she had failed to demonstrate prejudice from counsel's failure to tell her of the immigration consequences of her plea. Gonzalez appealed to the Nebraska Supreme Court.

The first argument the court addressed was whether it had subject matter jurisdiction over the appeal. The State argued that there was no jurisdiction because there was no vehicle for Gonzalez to use to withdraw her guilty plea over two years after conviction and judgment. The supreme court held that it did have jurisdiction over the appeal. In a detailed discussion, the supreme court held that there are three avenues available for a defendant to use to seek to withdraw a guilty plea if she claims she was not advised of the immigration consequences of such a plea:

(1) a motion for post conviction relief under the Nebraska Post Conviction Act; (2) statutory vacatur of a plea under §§ 29-1819.02 and 29-1819.03; and (3) a "common law motion to withdraw a plea."[109] The supreme court found that Gonzalez was not proceeding under the Post Conviction Act, nor was she seeking to use the statutory procedure in Chapter 29. So it turned its attention to the only remaining possibility: her common law motion to withdraw her guilty plea.

To begin with, the supreme court reiterated what it had foreshadowed in *Rodriguez-Torres*:[110] that a common law motion to withdraw a plea might exist in cases where a defendant could not use the provisions of either § 29-1819.02 or the Post Conviction Act to vacate the conviction. The court's language is important, and bears repeating verbatim (footnotes have been omitted):

> Gonzalez has pursued [a common law motion] here. And contrary to the State's suggestion, it is well established that a defendant may move to withdraw a plea, even after final judgment. However, the grounds for such a withdrawal are quite difficult for a defendant to prove –- the bar is set high. If a motion to withdraw a plea of guilty or no contest is made *before* sentencing, a court, in its discretion, may allow a defendant to withdraw his or her plea for any fair and just reason, provided the prosecution would not be substantially prejudiced by its reliance on the plea. But with respect to withdrawal of a plea of guilty or no contest made *after* sentencing, withdrawal is proper only where the defendant makes a timely motion and establishes, by clear and convincing evidence, that withdrawal is necessary to correct a manifest injustice. That standard applies even where a motion to withdraw a plea has been made after the sentencing court's judgment has become final. A

[109] *Id*. at 6, 807 N.W.2d at 765.

[110] Section I.D.2.b.(1)(a), *supra*.

> motion for withdrawal is timely if made with due diligence, considering the nature of the allegations therein, and is not necessarily barred because it was made subsequent to judgment or sentence.[111]

The common law motion described by the court was not given a name – it is simply a "common law motion to withdraw a plea." However, the court goes on to describe exactly how a defendant can show "manifest injustice" sufficient to allow withdrawal of a guilty plea after judgment or sentence by way of a common law motion:

> We have explained that "manifest injustice" may be proved if the defendant proves, by clear and convincing evidence, that (1) he or she was denied the effective assistance of counsel guaranteed by constitution, statute, or rule; (2) the plea was not entered or ratified by the defendant or a person authorized to so act on his or her behalf; (3) the plea was involuntary, or was entered without knowledge of the charge or that the sentence actually imposed could be imposed; or (4) he or she did not receive the charge or sentence concessions contemplated by the plea agreement and the prosecuting attorney failed to seek or not to oppose those concessions as promised in the plea agreement. And the defendant must plead and prove that such omissions have resulted in prejudice.[112]

In effect, in order to demonstrate "manifest injustice" sufficient to withdraw a guilty plea after sentencing where the issue is ineffective assistance of counsel, a defendant must prove up a *Strickland/Hill*[113] claim by clear and convincing evidence. It is also significant that the court's

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[111] *Gonzalez*, 283 Neb. at 7, 807 N.W.2d at 766.

[112] *Id.* at 8, 807 N.W.2d at 766.

[113] *Hill v. Lockhart*, 474 U.S. 52 (1985), is the case in which the Supreme Court held that Sixth Amendment effective assistance of counsel requirements apply to the plea negotiation stage of criminal proceedings.

description of "manifest injustice" tracks exactly the language found in Standard 14-2.1(b) of the ABA Standards of Criminal Justice, Pleas of Guilty. Although the Nebraska Supreme Court has held that these standards have not been "adopted" by the Nebraska Supreme Court in any formal sense,[114] the fact that the test set out by the court in *Gonzalez* for demonstrating "manifest injustice" exactly tracks the language in the ABA Standards suggests that, at the very least, the provisions of those Standards are highly influential in interpreting state common law in this area.

The court ultimately affirmed the denial of Gonzalez's motion, holding that she had not shown any prejudice from the failure of trial counsel to inform her of the immigration consequences of her plea. The court held that Gonzalez's testimony that she "would have looked for another solution" did not carry her burden of proof to show, by clear and convincing evidence under the *Strickland/Hill* prejudice prong, that she would have rejected the plea offer in favor of going to trial, and that such rejection would have been objectively reasonable under the circumstances.

(b) *State v. Diaz.*

In *State v. Diaz*[115] the defendant sought to withdraw a guilty plea he had entered in 2000, due to his lawyer's failure to advise him of the immigration consequences of the guilty plea. The procedural vehicle Diaz sought to use to withdraw his plea was a writ of error coram nobis.[116] At the time he filed his motion, Diaz had completed his sentence, and was no longer in state custody. The crimes

[114] *State v. Minshall*, 227 Neb. 210, 213-214, 416 N.W.2d 585, 588 (1987); *State v. Irish*, 223 Neb. 814, 818-819, 394 N.W.2d 879, 882 (1986).

[115] 283 Neb. 414, 808 N.W.2d 891 (2012).

[116] The purpose of the writ of error coram nobis is to bring before the court rendering judgment matters of fact which, if known at the time the judgment was rendered, would have prevented its rendition. It enables the court to recall some adjudication that was made while some fact existed which would have prevented rendition of the judgment but which, through no fault of the party, was not presented. The burden of proof in a proceeding to obtain a writ of error coram nobis is upon the applicant claiming the error, and the alleged error of fact must be such as would have prevented a conviction. It is not enough to show that it might have caused a different result. *Id*. at 420, 808 N.W.2d at 896.

to which Diaz pled guilty were misdemeanor attempted possession of cocaine, and driving while intoxicated. Diaz, a Honduran national, had been in the United States since 1994 pursuant to a grant of Temporary Protected Status from the United States Attorney General, which allowed him to stay in the United States, and work lawfully, until such time as the Attorney General determined it was safe for Hondurans to return home. Diaz's convictions made him removable from the United States because a TPS recipient who is convicted of two or more misdemeanors loses his TPS status.[117] Since Diaz had no other immigration status and no other relief from removal available to him, that meant he had no way to remain in the United States.

The trial court found that Diaz's uncontradicted testimony was insufficient to prove that he was not advised of immigration consequences by his trial lawyer in 2000, and further found that his testimony alone was insufficient to prove that he was currently in removal proceedings. As a result, the trial court denied his motion for a writ of error coram nobis. Diaz appealed.

The State argued that Diaz's motion should be considered to be the type of common law motion described by the court in *Gonazlez, supra,* and that a court does not have jurisdiction to consider such a motion once the defendant has completed his sentence. The supreme court declined to consider Diaz' motion as anything other than a motion for writ of error coram nobis, however, since all parties and the trial court had always treated the motion in that way. It then proceeded to analyze the propriety of a writ of error coram nobis in Diaz' situation.

The supreme court held that a writ of error coram nobis was not available to allow Diaz to withdraw his guilty plea. The essence of the writ, the court held, is to allow vacatur of a guilty plea where some unknown fact existed at the time of the plea that, had it been known, would have prevented the rendition of the judgment. The court held that Diaz's claim – that *Padilla* had been decided after his plea was entered – was not an unknown fact at the time he entered his plea, but rather an unknown issue of law. Although the court recognized that several federal courts

[117] 8 U.S.C. § 1254(c)(2)(B)(i).

have allowed withdrawal of pleas under a coram nobis theory in cases such as Diaz's, it found that the state law elements of a coram nobis claim in Nebraska do not match those in federal court, making coram nobis unavailable in a situation such as Diaz's. The court also clarified that common law motions, such as coram nobis (and the motion described by the court in *Gonzalez, supra*), originate from Nebraska's adoption of English common law, as codified in Neb. Rev. Stat. § 49-101.

Given its disposition of the case, the court did not reach the issue of whether *Padilla* applies retroactively.

(c) *State v. Yuma*.

The defendant in *State v. Yuma*[118] raised two issues on appeal: (1) could he use a common law motion to withdraw his plea, as recognized in *Gonzalez*, and (2) did *Padilla* apply to Yuma's case, since he plead guilty before *Padilla* was decided?

The supreme court held that the common law motion was available to Mr. Yuma because he could not use the Nebraska Post-Conviction Act to assert his ineffective assistance of counsel claim. He was released immediately upon being sentenced to time served and therefore was never in state custody as a result of his conviction, which is a requirement of the Post-Conviction Act.

As to the second issue, the supreme court held that *Padilla* did apply to Mr. Yuma's case. Although he entered his guilty plea before *Padilla* was decided, he was not sentenced until after *Padilla* was decided. Because his conviction was not final until the sentence was imposed, and because that date was after *Padilla* was decided, the "new rule" announced by *Padilla* applied to Mr. Yuma.

(d) *State v. Chojolan*.

In *State v. Chojolan*,[119] the supreme court held that *Padilla* does not apply retroactively to pleas that were entered before its effective date of March 31, 2010. However, as

[118] 286 Neb. 244, 835 N.W.2d 679 (2013).

[119] 288 Neb. 760, 851 N.W.2d 661 (2014).

noted above,[120] the Nebraska Supreme Court has never engaged in a detailed analysis of whether *Padilla* might apply retroactively under a state law *Strickland* analysis made possible by *Danforth*. The sum total of the supreme court's reasoning of this issue was succinct:

> In prior cases, we have noted that in *Chaidez v. U.S.*, the U.S. Supreme Court held that because *Padilla*, which was decided in 2010, announced a new rule, those defendants whose convictions became final prior to *Padilla* could not benefit from its holding. . . . In the present case, Chojolan was convicted and sentenced in 2006, and therefore the rule announced in *Padilla* in 2010 does not apply retroactively to his conviction. We conclude that the district court did not err when it determined that *Padilla* did not apply retroactively to Chojolan's 2006 plea and conviction.[121]

(e) *State v. Mamer*.

State v. Mamer[122] is a case with difficult facts that led to a questionable outcome. Mr. Mamer was charged with first degree sexual assault. On advice of counsel, he pled guilty to attempted first degree sexual assault. As the result of his conviction, Mamer served approximately three weeks after sentencing, since much of his sentence was comprised of time already served before the date of his sentencing. Mamer was discharged from state custody on October 7, 2011. On February 9, 2012, Mamer filed a motion to withdraw his guilty plea, alleging that his criminal defense counsel had not given him any advice regarding the immigration consequences of his guilty plea.[123] The basis

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[120] *See* section I.D.2.c.(3)(a), *supra*.

[121] 288 Neb. at 763, 851 N.W.2d at 663-664. The supreme court again reiterated, in summary fashion, that *Padilla* is not retroactive in *State v. Sandoval*, 288 Neb. 754, 851 N.W.2d 656 (2014).

[122] 289 Neb. 92, 853 N.W.2d 517 (2014).

[123] It is beyond dispute that Mamer's conviction of first degree sexual assault was an aggravated felony. *See* INA § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A).

of his motion was, in essence, the "manifest injustice" prong of the common law motion establish by the Nebraska Supreme Court in *State v. Gonzalez, supra.* The trial court denied Mamer's motion and he appealed.

The main issue in the case was whether or not Mamer could have proceeded under the Post-Conviction Act to try to vacate his guilty plea. As *Gonzalez* held, a common law motion to vacate is only appropriate if no other post conviction remedy is available to the movant. The court held that, because Mamer was in state custody for three weeks following his conviction, he could have proceeded under the Post Conviction Act and therefore it was proper for the trial court to grant the State's motion to dismiss his common law motion to vacate. Mamer's argument that he was not aware of the immigration consequences until the moment he was released from state custody was unavailing:

> Mamer argues in essence that his claim [of ineffective assistance of counsel] did not arise until after he was released from incarceration and knew of the immigration consequences of his plea–-and thus knew that his trial counsel's performance was ineffective. . . . Mamer views the factual predicate as including the actual commencement of removal proceedings, especially since he lacked representation while incarcerated to inform him of the presumptively mandatory deportation law . . . . Especially when Mamer was advised by the district court that his plea could have immigration consequences, Mamer with due diligence could have discovered his *Padilla* claim while still incarcerated. . . . Mamer plainly knew at the time of trial counsel's representation what trial counsel did and did not advise him of. . . . We conclude that Mamer's unawareness of the *Padilla* opinion, which was decided before his plea, does not concern the factual predicate for his ineffective assistance of counsel claim. Such alleged ignorance of *Padilla* concerns only the legal significance of the relevant objective facts. . . . In the exercise of due diligence—either with or without new

> counsel—Mamer could have discovered the applicable deportation law while incarcerated.[124]

This case enunciates a difficult and unforgiving rule. Here, the defendant alleged that his criminal defense counsel gave him no advice whatsoever that his guilty plea carried immigration consequences. He discovered those immigration consequences only when ICE arrived to take him into custody for removal proceedings – the very point in time at which he was no longer in state custody. Yet, because he was in state custody for three weeks after his criminal sentence was imposed, the court held that the common law motion to vacate was not available to him because he could have, without input from or assistance of counsel, filed a post conviction claim under the Post-Conviction Act during the three weeks he was in state custody.

The court pins its analysis on two factors. First, it notes that Mamer was given the general immigration advisement required by § 29-1819.02 at the time he entered his guilty plea. Second, it states that the factual predicate for Mamer's claim was his knowledge that his defense counsel did not advise him of the immigration consequences of his guilty plea. And, the court holds, the fact that Mamer only later understood the legal significance of this omission by criminal defense counsel does not mean that he was unaware of the fact that he was not advised regarding the immigration consequences of his plea.

The first point is highly problematic, because, in essence, it holds that a trial court that complies with its statutory duty under § 29-1819.02 has inoculated trial counsel against an ineffective assistance claim.[125] Other courts, citing both general principles and formal standards of practice, have disagreed with this conclusion, holding that the Sixth Amendment obligation mandated by *Padilla* is not affected

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[124] 289 Neb. at 97-100, 853 N.W.2d at 523-524 (emphasis supplied).

[125] This is not the first time the supreme court has hinted at this interpretation. *See also State v. Barrera-Garrido*, 296 Neb. 647 (2017) and *State v. Armendariz*, 289 Neb. 896 (2015), in which the supreme court implies that advice by the court may cure the failure of counsel to comply with their *Strickland* obligations. However, both of those cases were decided before the U.S. Supreme Court decided the *Lee* case, so their conclusions are subject to question.

or ameliorated by a general immigration advisement delivered by the court at the time it accepts a guilty plea.[126]

The second point puts unrepresented defendants in an untenable position of not only needing to be aware of naked facts giving rise to an ineffective assistance of counsel claim, but also of the legal significance of those facts. Under the court's holding, it was enough that Mr. Mamer knew that he was not advised of the immigration consequences of his guilty plea. Given his knowledge of what his counsel did not advise him, the court held that he could have, through the exercise of due diligence, brought an ineffective assistance of counsel claim before he knew that ICE wanted to deport him.[127] This rationale puts defendants who have received no advice regarding immigration consequences of their guilty plea in the nearly impossible position of having to discover those consequences on their own.

(f) *State v. Merheb*.

In *State v. Merheb*,[128] the court held that a defendant whose

[126] *See, e.g., U.S. v. Orocio*, 645 F.3d 630, 646 (3d Cir. 2011), *overruled on other grounds by Chaidez v. U.S.*, 568 U.S. 342 (2013): "The gist of the government's argument is that these two [court] colloquies, in tandem, put Mr. Orocio on notice that he could be removed. With that notice, the government argues, Mr. Orocio should have prepared arguments on appeal or filed a § 2255 petition. The question under *Strickland* and *Hill*, however, is not whether Mr. Orocio had later access to remedies, but whether he would have pled guilty at all." *See also*, Commentary, Standard 14.3-2, ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY, 3d ed. (1999): "Although the court must inquire into the defendant's understanding of the possible consequences at the time the plea is received under Standard 14-1.4, this inquiry, is not, of course, any substitute for advice by counsel. The court's warning comes just before the plea is taken, and may not afford time for mature reflection. The defendant cannot, without risk of making damaging admissions, discuss candidly with the court the questions he or she may have. Moreover, there are relevant considerations which will not be covered by the judge in his or her admonition." *See also, United States v. Rodriguez-Vega*, 797 F.3d 781 (9th Cir. 2015).

[127] Ironically, the court correctly states that the prejudice element of Mamer's claim relates to the decision of whether or not to plead guilty, not to whether he was subject to being deported as a result of the guilty plea. 289 Neb. at 100, 853 N.W.2d at 524. Yet at the time Mamer chose to plead guilty, he was not in possession of the legal knowledge regarding the immigration consequences of that plea, because trial counsel never advised him of those consequences.

[128] 290 Neb. 83, 858 N.W.2d 226 (2015).

conviction was final before *Padilla* was not entitled to vacate his guilty plea, since the U.S. Supreme Court in *Chaidez* held that *Padilla* is not effective retroactively. Again, though, there was not explicit analysis by the court as to whether the result might be different under a purely state analysis done pursuant to a *Danforth* analysis.

(g) *State v. Jerke*.

In *State v. Jerke*,[129] the Nebraska Supreme Court was invited to revisit its holding in *Mamer* under facts very similar to those in *Mamer*.

In 2012, Jerke pled guilty to an aggravated felony crime of violence, and was sentenced by the trial court to a term of imprisonment of four to six years. At no time did his trial counsel advise him of the immigration consequences of his guilty plea. In 2015, while serving his sentence, Jerke learned that he was not eligible for work release because he had an "immigration hold" on him. In 2017, after he had been released from state custody and after being formally notified that ICE was seeking to deport him, Jerke, through new counsel, filed a common law motion to vacate his conviction due to ineffective assistance of counsel.

The State opposed Jerke's motion at the hearing, arguing that the common law procedure was not available to him because he could have brought his claim under the Post Conviction Act while in state custody. Jerke prevailed on his post conviction claim at the trial level, arguing that the State had waived its objection by failing to file a motion to dismiss. The State appealed, both as to the procedural issue and as to the merits of Jerke's common law post conviction claim.

The supreme court held that the unavailability of either a statutory vacatur remedy under § 29-1819.02, or under the Post Conviction Act, is not an affirmative defense that must be raised by the State but, instead, is a material element of a defendant's claim, which must be pled and proved. As to the merits of Jerke's claim, the court held that he could have filed under the Act while still in state custody, and

[129] 302 Neb. 372, 923 N.W.2d 78 (2019).

that the common law remedy was therefore not available to him:

> Jerke argues that the "logical effect" of *Mamer* is "to place an obligation on an untrained defendant to generate the wherewithal to perform as a more competent attorney than his actual attorney, and to do so from within the confines of prison at a time when he has no reason to suspect a problem to begin with."
>
> Jerke's argument mischaracterizes our holding in *Mamer*. Most notably, *Mamer* did not hold that the factual predicate of an ineffective assistance of counsel claim exists at a time when a defendant has "no reason to suspect there was a problem." To the contrary, *Mamer* held that the factual predicate could have been discovered through the exercise of reasonable diligence once the defendant was advised by the trial court, pursuant to § 29-1819.02(1), that a conviction may result in immigration consequences. *Mamer* reasoned that from and after the time of that advisement, the defendant knew of a possible problem with his immigration status and, with the exercise of due diligence, could have discovered and raised the ineffective assistance of trial counsel argument during the period of incarceration.

Id. at 384, 923 N.W.2d at 86. In other words, the court stuck by its guns and refused to revisit its holding – and the underpinnings of that holding – announced in *Mamer*.

As it did in *Mamer*, the court implied, in the quoted language above, that the general advisement by the trial court of possible immigration consequences cures any failure by trial counsel to inform a client of immigration consequences. That is a troubling implication. And, in the opinion of this author, it is wrong.[130] Interestingly, the

[130] *See* footnote 125, *supra*. The mischief that this implication has created has found its way into holdings by the Nebraska Court of Appeals that have, without analysis, assumed the

Eighth Circuit, about a month after *Jerke* was decided, handed down an opinion that seems to contradict, or at least temper, the Nebraska Supreme Court's holding on this point.

(h) *Dat v. United States*.

In *Dat*,[131] in the Eighth Circuit Court of Appeals, the client, an LPR since the mid-1990's, was charged with two counts of Hobbs Act robbery. He pled guilty to one count, but before pleading guilty, Mr. Dat specifically asked his criminal defense counsel about the possible immigration consequences of his guilty plea. His defense counsel then "spoke to an immigration specialist," after which he advised Mr. Dat that his plea would not result in his removal from the U.S. because "he was a long-tenured lawful permanent resident, not an 'illegal immigrant.'" Thereafter, Mr. Dat rejected two plea agreements with "strong deportation language," and accepted one that acknowledged "there are or may be collateral consequences to any conviction to include but not limited to immigration," relying on his counsel's assurance that his guilty plea would not affect his immigration status.

Because Mr. Dat was sentenced to a term of imprisonment of 78 months, and because the crime to which he pled guilty was a crime of violence, the offense was clearly an aggravated felony crime of violence under INA § 101(a)(43)(F), subjecting him to mandatory removal from the U.S.

Once he learned of this, Mr. Dat moved to vacate his conviction under 28 U.S.C. §2255 (federal habeas), alleging ineffective assistance of counsel. The trial court denied his petition without holding a hearing on it, finding that he was advised of the immigration consequences by his plea agreement, his Petition to Enter a Plea of Guilty, and the colloquy with the court during the hearing at which his guilty plea was accepted. On appeal, the Eighth Circuit reversed and remanded.

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correctness of this conclusion. *See, e.g., State v. Gonsalez*, 2019 WL 7369233 (December 31, 2019); *State v. Diaz*, 2019 WL 3936274 (August 20, 2019).

[131] 920 F.3d 1192 (8th Cir. 2019).

The Eighth Circuit had no trouble finding deficient performance by trial counsel under *Strickland*'s first prong, since, under *Padilla*, the advice that conviction of an aggravated felony would not affect Mr. Dat's immigration status was clearly and obviously incorrect.

The court found that whether Mr. Dat had been prejudiced by his counsel's deficient performance to be "a closer question." The court held that if Dat could prove that he would have rejected the plea offer and insisted on going to trial but for counsel's immigration advice, that would show prejudice under *Strickland*'s second prong. The court noted that the Supreme Court, in the *Lee* case, held that factors such as a client's history in the U.S., his family circumstances, and his gainful employment all signal strong connections to, and desire to remain in, the country. As a result, the court held that, "At this stage, sufficient evidence support's [Dat's] assertions of prejudice."[132]

The court then addressed the government's argument that the combination of the plea agreement, the Petition to Enter a Plea of Guilty, and the colloquy with the court at the hearing at which his guilty plea was accepted made it impossible for Dat to show prejudice. The circuit court demurred:

> However, his counsel's alleged misadvice specifically undermined these equivocal warnings. They informed Dat of a general possibility of immigration consequences. They do not necessarily contradict or correct his counsel's alleged misadvice he would not suffer those consequences in his case. *Compare Doe*, 915 F.3d at 913 (counsel's misadvice—that deportation was not a mandatory result of the guilty plea—not remedied where judge asked if defendant understood he "may be deported" and did not inform him of the "mandatory consequences" of his plea to an aggravated felony), *and United States v. Akinsade*, 686 F.3d 248, 254 (4th Cir. 2012) ("general and equivocal admonishment" that defendant's

[132] *Id*. at 1195.

> plea "*could* lead to deportation" was "insufficient to correct counsel's affirmative misadvice that [defendant's] crime was not categorically a deportable offense"), *with United States v. Fazio*, 795 F.3d 421, 428 (3d Cir. 2015) (any error in counsel's failure to inform defendant his guilty plea subjected him to automatic deportation was cured by plea agreement and district court's "in-depth colloquy," both of which "made clear that [defendant] was willing to plead guilty even if that plea would lead to automatic deportation"). The record here is inconclusive whether the plea documents or district court remedied counsel's misadvice.[133]

On remand, the district court held an evidentiary hearing and once again denied Dat's habeas claim. On appeal, the Eighth Circuit affirmed the district court's denial of Dat's habeas claim, finding his trial counsel's testimony that she advised Dat he "could" face immigration consequences that "could" make him deportable was objectively reasonable and therefore did not prejudice him.[134] The Eighth Circuit justified this interpretation of *Padilla* in the following way:

> In *Padilla*, the Supreme Court held that counsel must advise the defendant that "his conviction would make him 'deportable' under 8 U.S.C. § 1227(a)(2)(B)(I) if he pleaded guilty, not that deportation or removal was either mandatory or certain." *United States v. Ramirez-Jimenez*, 907 F.3d 1091, 1094 (8th Cir. 2018) (per curiam). *Cf. Chaidez*, 568 U.S. at 345-46, 133 S.Ct 1103 (stating that under *Padilla*, "criminal defense attorneys must inform non-citizen clients of the *risks* of deportation arising from guilty pleas.") (emphasis added). An alien with a deportable conviction may still seek "relief from removal by providing evidence that he is eligible for asylum,

[133] *Id*. at 1195-1196.

[134] 983 F.3d 1045, 1048 (8th Cir. 2020).

> withholding of removal, or relief under the Convention Against Torture." *Ramirez-Jimenez*, 907 F.3d at 1094. These "immigration law complexities" should "caution any criminal defense attorney not to advise a defendant considering whether to plead guilty that the result of a post-conviction, contested removal proceeding is clear and certain." *Id*.[135]

Despite its shortcomings, the December, 2020 opinion in *Dat* does not retreat from the notion that a court's duty to give a general advisement does not relieve criminal defense counsel from their obligation to comply with their Sixth Amendment obligations under *Padilla*. In other words, *Dat* reaffirms the argument that a court's general advisement is no substitute for defense counsel's obligation to discuss, with some particularity, the immigration consequences a client may face if convicted of the offense with which the client is charged.

(5) Miscellaneous Considerations.

Practical Application

What does all of this mean in practice? Although reasonable minds can differ, it seems prudent for defense counsel to

[135] What is remarkable about this re-interpretation of *Padilla*, aside from the incentive it provides to defense counsel to give immigration advice so equivocal as to be functionally meaningless and worthless, is the blatantly false notion that a person convicted of an aggravated felony and sentenced to 78 months in prison is eligible for either asylum or withholding of removal, given the prohibitions in 8 U.S.C. § 1158(b)(2)(B)(i) (providing that a non-citizen convicted of an aggravated felony has been convicted of a "particularly serious crime," thereby disqualifying that person from receiving asylum) and 8 U.S.C. § 1231(b)(3)(B) (providing that a non-citizen who has been convicted of an aggravated felony and sentenced to at least 5 years' imprisonment has been convicted of a "particularly serious crime" that precludes the non-citizen from qualifying for withholding of removal). Additionally, equating the phrase "would make him deportable" with the phrase "could make him deportable" rewards imprecise legal advice at precisely the time when full and accurate advice is needed by the client. Particularly in the context of Dat's argument (that counsel had a duty to tell him if the plea would result in his removal), sanctioning the use of the word "could" in place of the word "would" feels like a bridge too far – especially given that Dat was convicted of an aggravated felony.

investigate, understand, and advise a client at least with respect to the following:[136]

(1) The immigration status of the client.[137] This is information that should be obtained at the initial interview. And it may not be enough to know simply "citizen" vs. "non-citizen," although at least that rudimentary piece of information must be obtained. Rather, counsel should try to find out precisely what is the immigration status of the client.[138]

(2) The potential inadmissibility consequences of the contemplated plea.

(3) The potential deportability consequences of the contemplated plea.

(4) Whether the crime with which the client is charged is an aggravated felony under 8 U.S.C. § 1101(a)(43).

(5) Whether the conviction would imperil any form of relief from removal for which the client would otherwise be eligible.[139]

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[136] In fact, as discussed earlier, the Iowa Supreme Court, by virtue of its holding in the *Diaz* decision, requires much more than this.

[137] The Massachusetts Supreme Court, in *Commonwealth v. Lavrinenko*, 38 N.E.3d 278 (2015), held that failing to inquire about the immigration status of a client is *per se* ineffective assistance of counsel:

Just as the ordinary physician must take a history from the patient before rendering a diagnosis, so, too, must the ordinary criminal defense attorney make a reasonable inquiry of his or her client regarding the client's history, including whether he or she is a citizen of the United States. . . . Unless a criminal defense attorney knows whether a defendant is a United States citizen, the attorney cannot properly evaluate the likelihood that the defendant will face immigration consequences, investigate potential avenues of relief, minimize such consequences through plea negotiations, or understand how highly the defendant values staying in the United States. *Id*. at 289-290.

[138] As discussed later, different immigration statuses carry different immigration consequences.

[139] This line of inquiry is required by the Nebraska Supreme Court's holding in *State v. Gonzalez, supra*. Recall that in that case the client was already in removal proceedings when she was convicted of the welfare fraud offense because she was in the country without documentation. One reading of the holding is that Gonzalez's trial counsel was ineffective in not advising her of the fact that her plea would imperil her eligibility to apply for cancellation of

Some commentators also urge that the following advice may be required by *Padilla*:[140]

(6) Whether the conviction would result in mandatory detention of the client by Immigration and Customs Enforcement (ICE).[141]

(7) Whether the conviction would preclude the client from demonstrating "good moral character."

Not Just for Defense Counsel

Although the basis for the holding in *Padilla* is clearly the Sixth Amendment, the Supreme Court stated that everyone involved in the criminal process has an interest in seeing that non-U.S. citizen defendants are properly advised regarding the potential immigration consequences of guilty pleas:

> [I]nformed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduces the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may

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removal for non-permanent residents under 8 U.S.C. § 1229b(b), which is a form of relief from removal for certain individuals who are not permanent residents of the United States.

[140] *See, e.g.,* Kathy Brady and Angie Junck, *How Much to Advise: What are the Requirements of Padilla v. Kentucky* (Practice Advisory published by the Defending Immigrants Partnership, April 20, 2010 http://immigrantdefenseproject.org/wp-content/uploads/2014/07/how_much_to_advise.pdf (last visited May 25, 2021).

[141] In my experience, this is often the most important consideration for many non-citizen clients.

> provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.[142]

Immigration Implications

The Board of Immigration Appeals (BIA)[143] has held that a successful ineffective assistance of counsel claim that results in the vacatur of a conviction means that there is no longer a "conviction" for immigration purposes.[144] As a result, a client who was deportable solely because of such a conviction is no longer deportable. *Padilla* claims will therefore have large consequences in both the criminal and immigration law realms.

Helpful *Padilla* Resources

Immigration Consequences of Criminal Activity, by Mary E. Kramer. Ms. Kramer is an immigration and criminal defense attorney practicing in Miami and has worked and written in this area for years. Her book is published by the American Immigration Lawyers Association (AILA), and was last updated in 2019 (8th edition).

Norton Tooby is a California practitioner who has also practiced and written extensively in this area for a number of years. He has several publications, some oriented to California law and some oriented to federal law. You can access those publications on his website: http://nortontooby.com/.

Finally, there are a number of organizations who have developed practice advisories on the *Padilla* decision and who generally have resources available to help criminal defense lawyers in this area. Some of those organizations are:

> Immigrant Defense Project
> https://www.immigrantdefenseproject.org/

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142 559 U.S. at 373.

143 *See* section II.C.2., *infra*, for a discussion of the BIA.

144 *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006). Compare with *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), holding that a conviction that is vacated as the result of post conviction events such as rehabilitation does not affect the immigration consequences of that conviction.

Immigrant Legal Resource Center
www.ilrc.org

National Immigration Project of the National Lawyers Guild
www.nationalimmigrationproject.org

E. General Immigration Resources.

The following is a non-exhaustive list of general immigration resources on immigration and criminal law that practitioners may find useful. Because this area is becoming increasingly important, new materials are appearing all the time, and practitioners are encouraged to keep abreast of new publications and electronic resources.

Immigration and Nationality Act The Immigration and Nationality Act (INA) is codified in Title 8 of the United States Code. In addition to being available from the usual sources, including online services such as Lexis and Westlaw, the Act is published by a number of commercial publishers. Note that the section numbers of the Act and the section numbers as codified in Title 8 of the United States Code are not numerically identical.[145] There is a version of the INA available on the U.S. Citizenship and Immigration Service's (USCIS) web page.[146]

Federal Regulations Regulations implementing the INA are scattered about various titles of the Code of Federal Regulations (C.F.R.). Most relevant implementing regulations are located in Title 8 of the C.F.R. Conveniently, the sections of the regulations found in Title 8 of the C.F.R. match the sections of the INA that they implement, at least for the most part.[147] Thus, for example, the regulations implementing § 212 of the INA are located at 8 C.F.R. § 212.

As with the Act itself, the USCIS website contains an accessible version of Title 8 of the C.F.R. The Government Printing Office (GPO) publishes annually a hard copy version of the C.F.R. However, as with the Act, the regulations are also available through various commercial vendors. Some of the commercial versions of the C.F.R. are updated more frequently than every year, and contain subject matter indices that are helpful in locating pertinent sections.

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[145] For example, § 212 of the Act deals with grounds of inadmissibility. However, in Title 8 of the United States Code, § 212 of the Act is codified as 8 U.S.C. § 1182.

[146] https://www.uscis.gov/ (last visited May 28, 2021).

[147] On February 28, 2003, some of the C.F.R. provisions were relocated in connection with the merger of the former Immigration and Naturalization Service (INS) into the Department of Homeland Security. Those provisions remain in Title 8 of the C.F.R., but the section numbers may not exactly correspond to the section numbers of the INA that they implement.

Precedent Opinions of the Attorney General and Board of Immigration Appeals (BIA) For many immigration cases, the BIA is the highest level of administrative review within the Department of Justice. As a result, precedent decisions of the BIA are controlling (absent any contrary opinions of a federal circuit court or the U.S. Supreme Court) on the Service[148] and on Immigration Judges. The Attorney General has the option of "certifying" BIA decisions to his/her office and issuing opinions that carry more authority than BIA decisions on the same topic.[149]

The BIA issues a number of decisions each year, but only those designated as "precedent" opinions are published and binding agency-wide. Before January 1, 2001, new precedent opinions were issued in slip opinion form, and given an interim number. These opinions were called "interim decisions" and were initially cited by the number given to each opinion.[150] When these opinions were later issued in bound volumes, they were called "I&N Decisions," and were given a new citation.[151] Since January 1, 2001, BIA precedent decisions are given both an interim decision number and an I&N citation when they are issued.[152] In mid-2021, I&N decisions were being published in volume 28.

BIA decisions are available from many sources. Perhaps the most convenient is the virtual library on the EOIR's official website.[153] Of course, BIA decisions are also available through other online databases, such as Lexis and Westlaw.

Immigration Law and Crimes This very helpful one-volume treatise is published by the Thomson/West Group and written by Dan Kesselbrenner and Lory D. Rosenberg. It provides a thorough and thoughtful discussion of most of the general issues regarding immigration consequences of criminal proceedings.

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[148] The term "Service," includes all divisions of what was formerly Immigration and Naturalization (INS), most of which are now a part of DHS. Today, those subdivisions include, *inter alia*, United States Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), and Customs and Border Protection (CBP).

[149] 8 C.F.R. § 1003.1(h). *See, e.g., Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G.2018).

[150] For example, the decision issued by the BIA on March 13, 1998, was initially cited as follows: *Matter of M-D-*, Int. Dec. #3339 (BIA 1998).

[151] The *M-D-* decision has been issued in the bound volume of BIA decisions and is now correctly cited as follows: *Matter of M-D-,* 21 I&N Dec. 1180 (BIA 1998).

[152] As an example, the BIA decision in *Matter of M-J-K*, was issued by the BIA on June 29, 2016. The interim decision number of the case is 3866, but the official cite is 26 I&N Dec. 773 (BIA 2016).

[153] https://www.justice.gov/eoir/ag-bia-decisions (last visited May 25, 2021).

Bender's Immigration Bulletin This publication by LexisNexis (Matthew Bender) is an immigration periodical that is issued twice a month. It contains topical articles, columns written by experienced immigration practitioners, news on recent immigration developments, case digests, and Federal Register publications relating to immigration law. Criminal law practitioners may find it helpful because it frequently contains articles on issues involving immigration consequences of specific types of crimes.

Immigration Law and Procedure This is a multi-volume comprehensive treatise on immigration law published by Matthew Bender under the auspices of Lexis-Nexis and authored by Gordon, Mailman & Yale-Loehr. Many consider it to be the definitive treatise on immigration law and procedure.

Kurzban's Immigration Law Sourcebook This is essentially an annotated outline of immigration law written by Ira Kurzban, a long-time immigration practitioner from Miami. Because it is organized by topic and includes legal citations relating to specific issues of immigration law, it is a good resource to help locate a quick answer to a specific question. It is published by the American Immigration Council.

II. IMMIGRATION AGENCY STRUCTURE.

A. Historical Overview.

Before March 1, 2003, all matters relating to immigration of non-U.S. citizens were handled by the Immigration and Naturalization Service (INS). In the pre-March 1, 2003, world, the United States Attorney General was charged with the administration and enforcement of the Immigration and Nationality Act (INA) and all other laws relating to immigration and naturalization of aliens.[154]

On November 25, 2002, the Homeland Security Act of 2002[155] became effective. That Act effected a massive restructuring of the federal agencies administering the immigration system in the United States. Most importantly, for purposes of this Guide, it abolished the INS as of March 1, 2003.[156] On that date, most of the responsibilities for

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[154] An "alien" is defined by the INA as any person who is not a citizen or national of the United States. INA § 101(a)(3), 8 U.S.C. § 1101(a)(3). A "national" of the U.S. is a person who is either a U.S. citizen or who owes permanent allegiance to the U.S. INA § 101(a)(22), 8 U.S.C. § 1101(a)(22).

[155] Pub. L. No. 107-296, 116 Stat. 2135, Nov. 25, 2002.

[156] Although the INS officially ceased to exist as of March 1, 2003, even as of 2016, retooling of that agency was still occurring. Thus, one still finds numerous references to the INS in statutes, regulations, directives, etc. To address this problem, Congress included transition and savings provisions in the Homeland Security Act of 2002 that provided that any reference to the INS in statute, regulation, directive, etc., shall be deemed to refer to the appropriate official or component of the new DHS. *See* §§ 1512(d) and 1517, Pub. L. No. 107-

administering immigration services and enforcement in the United States shifted to the Department of Homeland Security (DHS) and the bureaus that operate under its aegis.

At this time, there are essentially four federal agencies that have responsibilities relating to immigration: the Department of Homeland Security, the Department of Justice, the Department of State, and the Department of Labor. Most of the discussions in this Guide will relate to the first three agencies.

An organizational chart for the DHS is found on its website.[157] A brief description of each federal entity involved with various functions of the former INS[158] follows.

B. The Department of Homeland Security.

This Department was created by the Homeland Security Act of 2002, Title I, § 101.[159] The Act gives the DHS broad authority to secure the borders and interior of the United States against terrorist attacks. Section 102 of the Act[160] provides that the DHS is to be headed by a Secretary of Homeland Security, who is appointed by the President and confirmed by the Senate.[161]

There are several bureaus under the DHS umbrella that have responsibilities over immigration matters. Three are of particular interest: U.S. Customs and Border Protection, U.S. Customs and Immigration Enforcement, and U.S. Citizenship and Immigration Services.

1. United States Customs and Border Protection (CBP).

As described on its website, the CBP's mission is stated as follows: "To safeguard America's borders thereby protecting the public from dangerous people and materials while enhancing the Nation's global economic competitiveness by

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296, 116 Stat. 2135 (Nov. 25, 2002).

[157] https://www.dhs.gov/sites/default/files/publications/21_0402_dhs-organizational-chart.pdf (last visited May 28, 2021).

[158] The term of art used by most federal employees to refer to the former INS is "legacy INS."

[159] Codified at 6 U.S.C. § 111. The DHS website is found at: http://www.dhs.gov/ (last visited May 28, 2021).

[160] 6 U.S.C. § 112.

[161] To determine who is the current Secretary of DHS, go to https://www.dhs.gov/secretary (last visited May 28, 2021).

enabling legitimate trade and travel.."[162] What this means, among other things, is that CBP inspects[163] individuals who seek to enter the United States from abroad.[164] Thus, those seeking to enter the U.S. at any port of entry will be questioned and inspected by employees of the CBP. It is they who will determine if a non-citizen ought to be allowed to enter the U.S.[165]

2. United States Immigration and Customs Enforcement (ICE).

ICE describes its mission as follows: "[T]o promote homeland security and public safety through the criminal and civil enforcement of federal laws governing border control, customs, trade and immigration."[166] For immigration purposes, it is in charge of interior enforcement of immigration laws. Because it is in charge of interior enforcement, ICE, and specifically its Office of Enforcement and Removal Operations, is the federal entity with which most immigrants in Nebraska will find themselves dealing if they face or find themselves involved in removal proceedings.[167]

Of greatest interest to Nebraska practitioners, ICE has its local presence primarily in Omaha at the DHS facility.[168] The address of that facility, which houses not only local ICE personnel but also the Omaha United States Citizenship and Immigration Services (USCIS) Field Office[169] and the Omaha Immigration Court,[170] is 1717 Avenue H, Omaha, Nebraska 68110. There are also ICE branch offices located in: Sioux City, Iowa; Cedar Rapids, Iowa; Grand Island, Nebraska; and North Platte, Nebraska.

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[162] https://www.cbp.gov/about (last visited May 28, 2021).

[163] "Inspect" is a term of art that means, in essence, that the CBP interviews those who seek to enter the U.S. in order to determine if they have legal authority to enter and should be admitted to the U.S.

[164] In the pre-Homeland Security world, Customs Inspection was part of the Treasury Department.

[165] The CBP's website is located at: www.cbp.gov/ (last visited May 28, 2021).

[166] The ICE website is found at: www.ice.gov (last visited May 28, 2021).

[167] See section IV., *infra*, for a discussion of removal terminology and procedure.

[168] The Field Office to which the Omaha ICE office reports is the Minneapolis-St. Paul Field Office located in Bloomington, Minnesota. *See* https://www.ice.gov/contact/field-offices (last visited May 28, 2021) for a nation-wide listing of ICE Field Offices.

[169] See section II.B.3, *infra*, for a discussion of USCIS.

[170] See section II.C.1., *infra*, for a discussion of the Immigration Courts.

At last check, there are three Assistant Field Office Directors for ICE in Nebraska and Iowa. There are also 11 Supervisory Detention and Deportation Officers who work under the Field Office Directors.

ICE also operates detention facilities across the U.S. in which those involved in removal proceedings are held,[171] either pending a hearing before an Immigration Judge or following a hearing and pending removal from the United States.[172] In Nebraska, the three primary detention facilities are the Douglas County Jail in Omaha, the Cass County Jail in Plattsmouth, and the Hall County Jail in Grand Island.[173]

The local ICE offices also have one other category of employees who play a large role in immigration proceedings, particularly removal proceedings. Those individuals are trial attorneys who work for the Office of the Principal Legal Advisor (OPLA) in the local Offices of Chief Counsel.[174] Attorneys in the Office of Chief Counsel represent ICE before the Immigration Judges and, in general, prosecute removal proceedings on behalf of the government.[175] Attorneys representing clients involved in removal proceedings interact frequently with attorneys in the Office of Chief Counsel.

In the Omaha District ICE Office, Mr. Darrin Hetfield is currently the Deputy Chief Counsel for ICE and presides over an office of several attorneys.

3. United States Citizenship and Immigration Services (USCIS).

Section 451 of the Homeland Security Act of 2002 established, within DHS, a bureau of Citizenship and Immigration Services.[176] The responsibility of the USCIS is to process applications for immigration benefits filed by U.S. citizens or non-citizens. For example, if a U.S. citizen marries a non-citizen and wishes to get immigration benefits for the non-citizen spouse, she or he would file the

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[171] A listing of the major detention facilities operated by ICE is found at: http://www.ice.gov/detention-facilities/ (last visited May 28, 2021).

[172] See section IV., *infra*, for a discussion of removal proceedings.

[173] Further information on each county jail, as an ICE detention facility, can be found on the ICE website dealing with detention facilities cited above.

[174] More information on OPLA can be found at its website: https://www.ice.gov/about-ice/opla (last visited May 28, 2021).

[175] *See* section IV.B., *infra*., for a more detailed discussion of removal proceedings.

[176] The website for the USCIS is found at: www.uscis.gov/ (last visited October 9, 2020).

appropriate petition or application with the USCIS. Or if an employer wishes to bring a non-citizen employee to the United States to work, the appropriate petition/application would be filed with the USCIS.

a. Service Centers.

There are five USCIS Service Centers and one National Benefits Center in the United States. The Service Centers are located in: Mesquite, Texas; Laguna Niguel, California; Saint Albans, Vermont; Arlington, Virginia; and Lincoln, Nebraska. The National Benefits Center is located in Lee's Summit, Missouri. The Service Centers and Benefits Center receive the vast majority of applications for benefits that are filed with the USCIS. The staff at the Service Centers review the applications to make certain that they warrant approval. In the event a follow-up, in-person interview is required, Service Center staff forward applications to local USCIS field offices.

It is important to note that the Service Centers and Benefits Center are strictly "mail order" operations. They handle only applications that are mailed in to them and are not accessible to the public in general.[177]

The jurisdictions of the Service Centers used to be divided along geographic lines, but increasingly each Service Center is handling certain types of applications, regardless of where the applicant lives within the U.S.

The local field offices of the USCIS and the Service Centers are not in close communication with each other, even if they are in close physical proximity to one another. Therefore, clients who have problems with a Service Center will need to address their concerns directly to the Service Center –- the local field office normally will not be able to assist with such problems. And the reverse is also true.

b. District and Field Offices.

In 2003, USCIS inherited the field office structure of legacy INS, which consisted of three regions and 33 districts nation-wide.[178] However, in November 2006, USCIS re-structured its field offices in an attempt to distribute the workload more evenly among its offices nation-wide.[179]

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[177] The volume of mail handled by each Service Center is mind-boggling. Reliable reports are that each Center handles tens of thousands of pieces of mail each day.

[178] *See* background information, 71 FR 67623 (November 22, 2006).

[179] *Id*.

Currently, the USCIS field office serving Nebraska immigrants is located in Omaha, Nebraska at 1717 Avenue H. The Omaha Field Office is within the Kansas City District Office's jurisdiction.[180]

The Omaha Field Office is where in-person interviews take place in connection with applications for benefits. In such a case, an individual goes to this office if she or he has received an appointment letter instructing him or her to go to this office.

The Omaha Field Office also contains an Application Support Center (ASC). The ASC is the division of USCIS that takes biometrics (fingerprints and photographs) of individuals in connection with applications for immigration benefits.

C. Executive Office for Immigration Review (EOIR).

The Executive Office for Immigration Review (EOIR) is a division of the United States Department of Justice which has its headquarters in Falls Church, Virginia. It is headed by a director. The EOIR is divided into several sub-organizations.[181]

The EOIR contains two major components that deal with immigration matters: the Office of the Chief Immigration Judge and the Board of Immigration Appeals (BIA).[182]

1. Office of the Chief Immigration Judge.

The Chief Immigration Judge is responsible for the general supervision, direction and scheduling of the Immigration Judges.[183] At the present time, there are approximately 465 Immigration Judges who serve in various of the 69 different Immigration Courts nation-wide.[184]

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[180] 71 FR 67624 (November 22, 2006). The Kansas City District also contains the USCIS field offices in Des Moines, Iowa; Kansas City, Missouri; St. Louis, Missouri; and St. Paul, Minnesota.

[181] A breakdown of the organizational structure of the EOIR is found at https://www.justice.gov/eoir/organization-chart (last visited October 9, 2020).

[182] There are other divisions of the EOIR that deal with immigration matters, but these two divisions are most commonly encountered by those involved in criminal proceedings.

[183] 8 C.F.R. § 1003.9.

[184] For a complete listing of all Immigration Courts and the Immigration Judges assigned to each court, go to: https://www.justice.gov/eoir/eoir-immigration-court-listing (last visited May 28, 2020).

The Immigration Courts are essentially administrative trial courts in which individuals appear who are facing removal from the United States. Once a charging document is filed with an Immigration Judge by ICE, the Immigration Judges have jurisdiction to determine whether or not a person is removable from the U.S., and also have jurisdiction over most requests for relief from removal that are asserted.[185]

The Immigration Judges also have jurisdiction to hear requests to reduce bonds from those who are being held by ICE subject to posting a bond.[186]

2. The Board of Immigration Appeals (BIA).

The Board of Immigration Appeals (BIA), *inter alia*, hears appeals from most decisions made by Immigration Judges.[187] As such, it is the final administrative level of consideration available in most cases in which the government seeks to remove a non-citizen from the United States. The Board is currently comprised of 23 permanent members and 8 temporary board members.[188] There are also Temporary Board members designated from time to time in order to alleviate the workload of the regular Board members.[189]

The BIA can take summary action on appeals (either dismissing or affirming them),[190] can issue opinions that have no precedential value, or can issue "precedent opinions," which are binding on all Immigration Judges nation-wide unless a Judge is deciding a case in a circuit where a U.S. Circuit Court has established a contrary point of law.[191] The BIA's website includes a virtual law library with a link to precedent decisions issued by the BIA.[192]

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[185] 8 C.F.R. § 1003.14.

[186] 8 C.F.R. §§ 1003.19(a), 236.1(d), 1236.1(d). *See* section IV.C., *infra*, for a more complete discussion of bond issues in the immigration context.

[187] 8 C.F.R. § 1003.1(b).

[188] U.S. Dep't of Justice, *Board of Immigration Appeals,* https://www.justice.gov/eoir/board-of-immigration-appeals-bios (last visited October 9, 2020).

[189] 8 C.F.R. § 1003.1(a)(4).

[190] Dismissing, 8 C.F.R. § 1003.1(d)(2); affirming, 8 C.F.R. § 1003.1(e)(4).

[191] 8 C.F.R. § 1003.1(g).

[192] U.S. Dep't of Justice, *Virtual Law Library*, https://www.justice.gov/eoir/virtual-law-library (last visited October 9, 2020).

III. DETERMINING THE IMMIGRATION STATUS OF CLIENTS.

A. Generally.

In light of *Padilla*, every criminal law practitioner **must** now ascertain the immigration status of **each** of his or her clients. Failure to make this fundamental inquiry would certainly be Exhibit #1 in an ineffective assistance of counsel claim by a client who was not advised of possible immigration consequences of criminal proceedings.[193]

Attachment 2 is a questionnaire developed to gather information necessary not only to determine the immigration status of a client, but also the information necessary to advise a client of possible immigration consequences of criminal proceedings. If you gather the information this questionnaire seeks, you should have most of the information necessary to advise a client about possible immigration consequences of the charges he or she faces, or to which he or she is contemplating pleading guilty.

Obviously, if a client is a U.S. citizen, then none of the issues discussed in this Guide are germane, since a criminal conviction carries no immigration consequences for U.S. citizens.[194] However, it is very important to inquire about a client's immigration status at the beginning of representation, since it could alter to a significant extent the strategy employed in representing the client. The following sections discuss various categories of immigration status.

Because there are so many different types of immigration statuses, it is impossible to address all of them in the following sections of this Guide. I have attempted to list some of the more common types of statuses, or at least those I believe may be most frequently encountered by practitioners. However, practitioners should always ask to see all documents relating to immigration status that a client may have, in order to determine

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[193] *See, e.g., Commonwealth v. Lavrinenko*, 38 N.E.3d 278, 288-289 (Mass. 2015).

[194] This technically is not true, although certainly a U.S. citizen cannot be removed from the country as the result of criminal proceedings. However, the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 594 (July 27, 2006), provides, *inter alia*, that U.S. citizens who have been convicted of a "specified offense against a minor" cannot petition to bring a relative or fiancé to the U.S. unless there is a finding that such U.S. citizen will pose no harm to such relative or fiancé. INA § 204(a)(1)(A)(viii), 8 U.S.C. § 1154(a)(1)(A)(viii); the list of offenses that will cause problems includes kidnapping (unless committed by a parent or guardian); false imprisonment (unless committed by a parent or guardian); solicitation to engage in sexual conduct; use of a child in a sexual performance; solicitation to practice prostitution; video voyeurism as defined in 18 USC § 1801; possession, production or distribution of child pornography; criminal sexual conduct; use of the Internet to facilitate or attempt such criminal conduct; and any conduct that, by its nature, is a sex offense against a minor. 42 U.S.C. §16911(7).

whether a client has some sort of immigration status in the U.S. and, if so, what that status is and how it might affect decisions to be made in the criminal case.[195]

It is possible that clients may have more than one immigration status at a time.[196] Because the immigration consequences will affect some types of non-citizens more than others, it is important to try to determine **all** immigration statuses of your clients. If you have doubts about the implications of your clients' immigration status(es), you should consult with an immigration practitioner.

B. United States Citizens.

1. Overview.

As mentioned above, with the exception of Adam Walsh Act[197] concerns, if your client is a U.S. citizen, then you can put this Guide down and concentrate only on the criminal aspects of the case. If the client is a U.S. citizen, then ICE cannot remove him or her from the U.S. due to a criminal conviction.

2. How to Determine if Your Client is a U.S. Citizen.

How do you know if your client is a U.S. citizen? U.S. citizenship can be obtained in four main ways: (1) birth in the United States, (2) naturalization, (3) derivatively through one's parents, and (4) birth abroad if at least one parent was a U.S. citizen. Each of these methods is discussed in greater detail below.[198]

While some of these contingencies may seem like they would happen infrequently, you should make certain to ask your client about them –- they may be more common than you think.

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[195] If your client is not on ICE's radar screen, however, you should think long and hard about trying to contact USCIS or ICE to request any of their documentation about the client. If there are other ways to obtain immigration documentation about the client, they should be explored before contacting the immigration authorities.

[196] For example, a client may have an asylum claim pending but also be a recipient of Temporary Protected Status. *See* sections III.H. and III.I.1., *infra*.

[197] *See* footnote 194, *supra*.

[198] Brent Wolzen, an immigration lawyer practicing in Lincoln, wrote an excellent article on how to determine whether your client is a U.S. citizen. Brent's article was published in the October 2010 issue of The Nebraska Lawyer, which is available online. Brent Wolzen, *U.S. Citizens: Do We Know One When We See One?*, Nebraska Lawyer (Oct. 2010), https://cdn.ymaws.com/www.nebar.com/resource/resmgr/nebraskalawyer_2010plus/2010/october/TNL-1010d.pdf (last visited June 1, 2021).

a. Birth in the United States and Documents to Prove Status.

A person who is born in the United States[199] who is subject to the jurisdiction of the United States is a U.S. citizen.[200] It does not matter what the parents' immigration status is; if the person is born in the U.S. and is subject to its jurisdiction, that person is a U.S. citizen.[201]

Additionally, a person of unknown parentage found in the United States while under five years of age (a "foundling") is also a U.S. citizen, unless, before such a person attains the age of 21, he or she is shown not to have been born in the U.S.[202]

The most obvious way to prove birth in the U.S., and thus demonstrate U.S. citizenship, is by producing a certified copy of a U.S. birth certificate. A U.S. passport is also conclusive evidence of U.S. citizenship. There may also be other documents that can be used to demonstrate birth in the U.S., but the nuances of secondary forms of proof are beyond the scope of this Guide. However, if you believe that your client was born in the United States, and is therefore a United States citizen, you should gather all forms of proof that would tend to demonstrate that fact.

b. Naturalization (and Documents).

Naturalization is the process by which people who were not U.S. citizens at birth attain U.S. citizenship. Generally speaking, in order to obtain U.S. citizenship through naturalization, a person must have been a permanent resident (i.e., have had a "green card") for a period of at least five years (three years in the case where the person obtained permanent residency as the result of marriage to a U.S. citizen) and must file an application for citizenship with the USCIS.[203]

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[199] "United States," when used in the Immigration and Nationality Act, includes the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the U.S. Virgin Islands. INA § 101(a)(38); 8 U.S.C. § 1101(a)(38).

[200] INA § 301(a); 8 U.S.C. § 1401(a).

[201] The language "subject to the jurisdiction thereof" in § 301(a) of the INA is meant to exclude from citizenship those people born in the U.S. whose parent is a foreign diplomatic officer accredited to the United States. Such people are lawful permanent residents but are not U.S. citizens. 8 C.F.R. §§ 101.3, 1101.3.

[202] INA § 301(f); 8 U.S.C. § 1401(f).

[203] The statutes dealing with naturalization are found in the INA beginning with § 310 (8 U.S.C. § 1421).

The qualifications for and steps involved in becoming a U.S. citizen through naturalization are beyond the scope of this Guide. However, once a person gains citizenship through naturalization, he or she will be given a certificate of naturalization. Although an example of a certificate of naturalization could formerly be found on the USCIS website, that is no longer the case. However, if you do a Google search, you can find websites that will give you examples of naturalization certificates.[204]

c. Derivative Citizenship (and Documents).

The Child Citizenship Act of 2000 (CCA) became effective February 27, 2001.[205] That Act, *inter alia*, amended section 320 of the INA[206] by allowing certain children born outside of the United States to obtain citizenship automatically through their parents.[207]

In order to benefit from the CCA, a child must meet the following conditions:

(1) At least one parent is a U.S. citizen (by birth or naturalization);
(2) The child is under 18 years of age;
(3) The child was lawfully admitted to the U.S. as a permanent resident (i.e., has a "green card") and is residing in the U.S. in the legal and physical custody of the citizen parent; and
(4) If the child is adopted, the adoption must be final.[208]

Most beneficiaries of this provision are foreign-born children who are adopted by U.S. citizens and who enter the U.S. as permanent residents. Such children automatically become U.S. citizens upon entry into the U.S. under the above-referenced provisions.

Any child who met all these requirements as of the effective date of the CCA (February 27, 2001) automatically obtained U.S. citizenship.

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[204] For example, https://www.immihelp.com/sample-certificate-of-naturalization-us-citizenship/ (last visited October 9, 2020).

[205] Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000).

[206] 8 U.S.C. § 1431.

[207] The USCIS Policy Manual, Volume 12, Part H, Chapter 4, has a chapter that discusses the concept of derivative citizenship fully. The Policy Manual also has a chart that helps to determine if a child has acquired citizenship after birth. https://www.uscis.gov/policy-manual/volume-12-part-h-chapter-4 (last visited October 12, 2020).

[208] INA § 320, 8 U.S.C. § 1431.

However, the Act is <u>not</u> effective retroactively, meaning that children who met these requirements <u>before</u> the effective date of the CCA did <u>not</u> automatically acquire citizenship as the result of its provisions.

Children who automatically acquire U.S. citizenship through their parents may file Form N–600 with the USCIS to get a certificate of citizenship. The certificate of citizenship looks very similar to the certificate of naturalization.[209] Such children may also obtain a U.S. passport evidencing their citizenship status.

More information on the CCA can be found on the USCIS website.[210]

d. Birth Abroad if at Least One Parent was a U.S. Citizen (and Documents).

Some people who were not born on U.S. soil are U.S. citizens because one or both of their parents were U.S. citizens. Therefore, even though a child was born outside the United States, he or she may, in fact, be a U.S. citizen, depending on the immigration status of his or her ancestors.

The current statutory provisions governing the granting of U.S. citizenship to children born outside of the U.S. are found at INA § 301(c), (d), (e), (g) and (h).[211] However, determination of whether a person born outside the U.S. obtained U.S. citizenship through one of his or her parents is a complex determination, because most often it depends upon the law of U.S. citizenship that was in effect at the time of the person's birth.[212]

As an example of how complex this area of law is, consider the application of INA § 301(h), 8 U.S.C. § 1401(h), which became effective on October 25, 1994, and applied retroactively.[213] The purpose of this amendment was to convey citizenship retroactively to any person born

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[209] An example can be found on the USCIS website: https://www.uscis.gov/sites/default/files/document/guides/N-560.pdf (last visited October 12, 2020).

[210] https://www.uscis.gov/policy-manual/volume-12-part-h-chapter-4

[211] 8 U.S.C. § 1401(c), (d), (e), (g) and (h).

[212] As in the case of derivative citizenship, the USCIS Policy Manual, Volume 12, Part H, Chapter 3, and attendant charts, assist in determining if a person who was born outside of the U.S. is a citizen. https://www.uscis.gov/policy-manual/volume-12-part-h-chapter-3 (last visited October 12, 2020).

[213] *See* § 101, Pub. L. No. 103-416, 108 Stat. 4305 (Oct. 25, 1994).

outside of the United States before noon (EST) on May 24, 1934, to a U.S. citizen mother and non-citizen father if, prior to the person's birth, the mother resided in the U.S.[214] One effect of this amendment was to make Winston Churchill a U.S. citizen retroactively, because his mother was a U.S. citizen who resided in the United States before his birth.

To reiterate, it is important when determining whether a client might be a U.S. citizen to go back several generations. If any of the person's ancestors were U.S. citizens, there is a possibility that the client, even though born abroad, might be a U.S. citizen.

As with children who automatically acquire citizenship through their parents, individuals who are U.S. citizens born abroad may either apply for a certificate of citizenship through the USCIS, or for a U.S. passport or some other government-issued document evidencing their U.S. citizenship.

e. Loss of Citizenship.

There are limited circumstances in which a person can renounce his or her citizenship, or it can be revoked.[215] Although you may run into such a case, the probability of encountering a client whose U.S. citizenship has been renounced or revoked is very low. Generally speaking, it is much easier for someone to lose his or her citizenship if it was acquired derivatively or as the result of naturalization, rather than through birth in the U.S.

Renunciation of citizenship is extremely rare and can only be accomplished by committing one of the acts listed by statute.[216] The issue of renunciation usually would arise in connection with some proceeding in which the person's citizenship becomes an issue, and

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[214] Prior to the amendment, only U.S. citizen fathers could transmit citizenship to children born before May 24, 1934, if such children were born outside the U.S. to one citizen parent and one non-citizen parent. If the mother was the U.S. citizen and the father was the non-citizen parent, no such transmittal of citizenship could occur. *See Wauchope v. U.S. Dep't of State*, 985 F.2d 1407 (9th Cir. 1993) for a discussion of this issue.

[215] However, that's not to say it can never happen. See, e.g., *United States v. Hamed*, 976 F.3d 825 (8th Cir. 2020), where a person's naturalized citizenship was revoked because of misrepresentations he made on his application for naturalization.

[216] INA § 349(a), 8 U.S.C. § 1481(a). One example of an act of renunciation is obtaining naturalization in a foreign country after reaching the age of 18. INA § 349(a)(1), 8 U.S.C. § 1481(a)(1). Other acts are listed in the subsequent subsections of the statute.

normally would involve either the State Department or the DHS. Most clients know if they have been the subject of renunciation proceedings.

Revocation, by contrast, is normally handled through the courts. Generally speaking, a person's citizenship can be revoked if that person, during the course of naturalization proceedings, engaged in some sort of fraud to obtain his or her citizenship, or was in some way ineligible for citizenship.[217] Again, most clients know if they have been the subject of proceedings to revoke citizenship acquired through naturalization. But ask, just to be sure.

C. Legal Permanent Residents (and Documents).

A legal permanent resident (LPR) is a non-citizen who, in general, has the right to remain in the U.S. for as long as she or he wishes. LPRs are entitled to work in the U.S. incident to their status, meaning they do not need a separate document indicating their right to work. There are many avenues by which a person can become an LPR, but the LPRs most often encountered are ones who obtained their status as the result of a qualifying relationship to a U.S. citizen or another LPR.

LPRs have many aliases: "permanent residents," "permanent resident aliens," "resident aliens," "green card holders," and so forth. All of these phrases mean that the person is an LPR.

Do not make the mistake of assuming that because the word "permanent" appears in the title describing an LPR's status, he or she cannot be deported from the U.S. **Any** person who is not a citizen can, under certain circumstances, be deported -- even an LPR who has lived virtually his or her entire life in this country. An LPR who has spent 50 years in the U.S. but is convicted of a deportable criminal offense is in just as much peril of being put into deportation proceedings as one who has lived here only five months. The only way one can prevent deportation consequences is to become a U.S. citizen.

All LPRs will have a document they can show you to verify their status. That document is the Permanent Resident Card. The current USCIS form number for the Permanent Resident Card is I-551. Some clients may have the older version of the card, which is legacy INS form I-151. However, only the I-551, containing an expiration date, is valid proof of LPR status.[218] Until 2010, the "green card" was not actually green. However, the Department of Homeland Security now issues I-551 cards that are green in color,

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[217] INA § 340, 8 U.S.C. § 1451.

[218] *See* commentary at 72 FR 46922-01 (August 22, 2007).

perhaps as a concession to the I-551's street name. Examples of "green cards," both historical and current, can be found on the USCIS website.[219]

The I-551 card has a metallic strip and is designed to function similarly to a credit card. By scanning this card, immigration and law enforcement and service agencies are able to learn information about the card holder through their computer database.

The information on the front of the Permanent Resident Card contains the client's date of birth, alien registration number (an eight-digit number preceded by the letter "A"), and the date on which the Permanent Resident Card expires. It is important to understand that, although a Permanent Resident Card is valid for only ten years at a time, once the card expires it does **not** mean that the person loses her or his status as an LPR. It simply means that the person needs to acquire an updated Permanent Resident Card in order to have a current document verifying his or her status. LPR status can only be revoked as the result of administrative proceedings that comply with statutory and regulatory requirements and procedural due process – simple expiration of the Permanent Resident Card is not sufficient to revoke someone's LPR status.

D. Conditional Permanent Residents (and Documents).

Some non-citizens are granted LPR status on a conditional basis, and are referred to as Conditional Permanent Residents (CPRs). Such individuals have the same status as LPRs for purposes of living and working in the U.S. These individuals are referred to as "conditional" because they have been processed for permanent residence status within 24 months of their marriage to a U.S. citizen. The Immigration and Nationality Act requires that such persons be given a conditional status, which the non-citizen and spouse must jointly petition USCIS to remove at the end of the 24-month period. If the condition is successfully removed, the person will become a full-fledged LPR.[220]

CPRs will also have a Permanent Resident Card, but the card will indicate on its face, at least to the trained eye, that the bearer is merely a CPR. Probably the easiest way to tell that someone is a CPR is to look at the expiration date on the Permanent Resident Card. If the expiration date is two years from the date of issue, as opposed to 10 years, then the person is a CPR.

Unlike non-conditional permanent residents, however, a CPR must timely petition to remove the conditions on his or her status. If she or he does not, then his or her status is revoked as of the second anniversary of his or her being granted CPR status.[221] What

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[219] USCIS, *Form I-9 Acceptable Documents*, https://www.uscis.gov/i-9-central/form-i-9-acceptable-documents (last visited October 12, 2020). USCIS began issuing a new version of the "green card" on May 1, 2017.

[220] *See* INA § 216, 8 U.S.C. § 1186a; 8 C.F.R. Parts 216 and 1216.

[221] INA § 216(c)(2)(A); 8 U.S.C. § 1186a(c)(2)(A).

this means is that if you have a client whose Permanent Resident Card was only good for two years after the date of issuance, and those two years have passed and the client does not have a new green card, that client is likely out of status and subject to being removed from the U.S. If the client is in removal proceedings due to his or her CPR status being terminated, it is possible for the client to ask for the Immigration Judge to grant permanent resident status as part of the relief sought in removal proceedings.[222] If you encounter a client in this situation, you should explore what the status of the removal proceedings are, to determine if there is a possibility that his or her permanent resident status may be granted by the Immigration Judge.

E. Non-Immigrants (and Documents).

Non-immigrants are individuals who are in the U.S. on a temporary basis. Such individuals are entitled to remain in the U.S. for as long as their status authorizes them to be here. They are required to leave the U.S. once their status expires. They are not entitled to remain in the U.S. on a permanent basis. Some non-immigrants are entitled to work and some are not -- it depends on what category of non-immigrant a person is.

There are a number of non-immigrant categories under the INA.[223] Examples include tourists, business visitors, professionals employed as temporary workers, students, fiancees of U.S. citizens, performers, foreign government representatives, certain witness informants, trafficking victims, victims of certain types of criminal activity, certain family members of LPRs who have been waiting more than three years for an entry visa, and so forth.

In the old days, non-immigrants were issued a paper Form I-94 by the CBP at the time they entered the U.S. The I-94 is frequently referred to as an "Arrival/Departure Record." The date and place of admission, the status in which the person was admitted, and the date until which the person has been given permission to remain in the U.S. all appeared in the upper right section of the paper I-94. Today, however, all of the arrival and departure information is stored electronically and can be accessed online.[224]

Non-immigrants from Mexico may also have a Border Crossing Card (BCC), sometimes referred to as a "laser visa." Border Crossing Cards allow their holders to enter the U.S. without obtaining an I-94 if they remain within 25 miles of the U.S./Mexican border upon entry (55 miles in New Mexico and 75 miles in Arizona).[225] An example of a BCC can

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[222] INA § 216(c)(2)(B); 8 U.S.C. § 1186a(c)(2)(B).

[223] *See* INA § 101(a)(15), 8 U.S.C. § 1101(a)(15), for a list of non-immigrant categories.

[224] A more complete description of how the I-94 information is now stored and accessed can be found on the CBP website: U.S. Customs & Border Protection, *Arrival/Departure Forms: I-94 and I-94W*, https://www.cbp.gov/travel/international-visitors/i-94 (last visited June 2, 2021).

[225] 8 C.F.R. § 235.1(h)(1)(iii).

be found on page 9 of a 2012 CBP publication entitled CBP Rail APIS Document Guidance.[226] Although on their faces, BCCs state that they are valid for 10 years at a time; this does not mean that the holder can remain in the U.S. for 10 years. In fact, BCCs allow the holder to remain in the U.S. only for periods of up to 30 days at a time after which they must leave the U.S.[227]

F. Parolees (and Documents).

At present, there are two main types of parole: (1) so-called humanitarian parole and (2) parole in place (PIP).

Humanitarian parole. One who has been granted humanitarian parole has been allowed to enter the U.S. physically, but under the law, the person has not effected an "entry" as defined in the INA.[228] As the cited statute indicates, the benefit of humanitarian parole is extended only in cases involving urgent humanitarian concerns or significant public benefit.[229] And once the purpose of the parole is served, the non-citizen must leave the U.S.

Parole in place (PIP). This is a much newer form of parole, and is available to spouses, minor children and parents of U.S. citizen military personnel. The benefit of PIP is to allow military family members the ability to adjust status from within the U.S. if they were not admitted pursuant to law.[230] A qualifying family member of a U.S. citizen military member can ask for PIP in order to achieve lawful permanent resident status while remaining physically inside the U.S.[231]

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[226] U.S. Customs & Border Protection, *CBP Rail APIS Document Guidance*, https://www.cbp.gov/sites/default/files/documents/apis_doc_3.pdf (last visited June 2, 2021).

[227] 8 C.F.R. § 235.1(h)(1)(iii). As seen from the regulation, under some circumstances the period of authorized stay is as short as 72 hours.

[228] INA § 212(d)(5), 8 U.S.C. § 1182(d)(5).

[229] An example of when parole would normally be granted is to allow a non-citizen to undergo necessary medical treatment.

[230] Under INA § 245(a) (8 U.S.C. § 155(a)), a person cannot apply to become a permanent resident while remaining in the U.S. unless he or she was "inspected and admitted or paroled into the United States. . ."

[231] A detailed discussion of PIP can be found in the USCIS policy memo implementing it: USCIS, *Discretionary Options for Military Members, Enlistees and Their Families*, https://www.uscis.gov/military/discretionary-options-for-military-members-enlistees-and-their-families (last visited June 2, 2021).

One who has been paroled into the U.S. will have a document issued by the CBP indicating she or he was given parole.

G. Refugees (and Documents).

Technically, refugees are a category of non-immigrants.[232] However, they are discussed separately here because of their unique situation.

Refugees are people who have been identified as victims of persecution in their home countries on account of their race, religion, national origin, membership in a particular social group, or political opinion.[233] This determination is made by the U.S. government *before* entry into the U.S. Refugees thus enter the U.S. with the status of a "refugee," which is a term of art under the INA. Refugees are entitled to adjust their status to that of an LPR once they have resided in the U.S. for at least one year.[234]

Persons who enter the U.S. as refugees are issued Form I-94 by the admitting CBP officer on which is stamped: "Admitted as a Refugee Pursuant to section 207 of the Act. If you depart the United States you will need prior permission to return. EMPLOYMENT AUTHORIZED."[235]

H. Asylees (and Documents).

As with refugees, asylees are technically non-immigrants. These are people who initially enter the U.S., either with or without documentation, and *then* assert that they qualify for asylum as the result of fitting the definition of "refugee" found in INA § 101(a)(42).[236] If they can prove this assertion they are granted asylum and have the status of "asylee."

There are two methods by which a person may be granted asylee status, and therefore two different types of documents that you should look for to verify this status.

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[232] In the world of immigration law, there are only two types of non-citizens: immigrants and non-immigrants.

[233] INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).

[234] INA § 209, 8 U.S.C. § 1159.

[235] *See, e.g.,* Handbook for Employers, Section 6.3 https://www.uscis.gov/i-9-central/handbook-for-employers-m-274/60-evidence-of-status-for-certain-categories/63-refugees-and-asylees (last visited June 2, 2021). The I-94 may also say "Paroled as a Refugee. . ." because in the past ICE considered that some refugees were merely paroled into the U.S. and not actually "admitted." The BIA has held, however, that since 1997 all refugees are "admitted" and not paroled into the U.S. *Matter of D-K-*, 25 I&N Dec. 761 (BIA 2012).

[236] 8 U.S.C. § 1101(a)(42).

1. Affirmative Asylum Recipients (and Documents).

A person seeking asylum can file an "affirmative" asylum application with USCIS.[237] That application is eventually assigned to an asylum officer with the USCIS, who conducts an interview with the applicant and renders a decision on the application. If the applicant is granted asylum status, she or he will have one and possibly two documents evidencing that fact. First, the client should have a written decision issued by the asylum officer stating that the client was granted asylum.[238] Second, the client may have an employment authorization document (EAD). Although asylees are authorized to work in the U.S. incident to their status as asylees,[239] many of them apply for and receive an EAD as evidence of their status and right to work. The document also serves the dual purpose of being a government-issued photo i.d., which clients find helpful to have. An example of an EAD can be found on the USCIS website listing types of documents acceptable for verifying employment authorization in the U.S.[240]

2. Defensive Asylum Recipients (and Documents).

Asylum applications can also be pursued before Immigration Judges in the context of removal proceedings. Asylum is one form of relief from removal that

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[237] An asylum application is filed on USCIS Form I-589. A complete list of USCIS forms and instructions for completing them can be found on the USCIS website. https://www.uscis.gov/forms/all-forms (last visited June 2, 2021).

[238] An asylum recipient's immediate family members (spouse and minor [under age 21 and unmarried] children) may apply for and receive derivative asylum status through the recipient. This can be done either at the same time the principal applicant requests asylum or after the principal is granted asylum. If the family members are in the U.S. and included on the principal applicant's I-589, then they will receive derivative asylum status once the principal's application is approved. If the family members are abroad, the principal applicant files USCIS Form I-730 to bring them to the U.S. as derivative asylees. In such case, the documents of the family members would look slightly different from that of the principal recipient, but they nonetheless should clearly indicate that the bearer has the status of an asylee.

[239] 8 C.F.R. § 274a.12(a)(5).

[240] USCIS, *Form I-9 Acceptable Documents*, https://www.uscis.gov/i-9-central/form-i-9-acceptable-documents (last visited October 12, 2020). EADs are granted to individuals who fall into one of the regulatory "pigeon holes" authorizing them to work. For example, a person who has been granted asylum is authorized to work pursuant to the provisions in 8 C.F.R. § 274a.12(a)(5). That regulatory reference appears on the EAD issued to such a person. If a client has an EAD, you can therefore get a clue as to the immigration status of the client by looking at the regulatory category listed on the EAD.

eligible clients may seek.[241]

If a client is successful in pursuing a defensive asylum application, she or he will have a copy of the Immigration Judge's decision granting asylum, which will take the form of a boilerplate court order with the appropriate boxes checked, and signed by the Immigration Judge. As with affirmative asylum recipients, clients who have received asylum from an Immigration Judge may also have an EAD indicating that they are asylum recipients.

I. Special Categories.

There are several different programs administered by the USCIS that allow non-citizens to remain in the U.S. and, in some cases, receive employment authorization, but do not grant them any "official" immigration status. Some of those programs are discussed below.

1. Temporary Protected Status (TPS) (and Documents).

The Temporary Protected Status program allows the Secretary of the Department of Homeland Security to permit non-citizen nationals from designated countries to remain in the U.S. on a temporary basis until it is safe for such persons to return to their home countries.[242] Generally speaking, countries are designated by the Secretary because of ongoing armed conflict, natural disaster, or some other such condition.[243]

Clients who have received a grant of TPS are authorized to remain in the U.S. until the Secretary terminates the TPS designation for their country, and are authorized to work.[244] However, such individuals do not receive any sort of permanent permission to remain in the U.S. At such time as the TPS designation is either terminated or allowed to expire by the Secretary, such TPS recipients must leave the U.S.[245]

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[241] Relief from removal is akin to an affirmative defense to a removal proceeding. If the immigrant is successful in obtaining relief from removal, that will prevent his or her deportation. Relief from removal works procedurally much like an affirmative defense in the sense that the immigrant has the burden of pleading and proving eligibility for the particular form of relief from removal she or he seeks.

[242] *See* INA § 244, 8 U.S.C. § 1254, for a general description of the TPS program.

[243] In the case of Haitians, for example, TPS status was initially granted in January, 2010, because of the damage wrought by the earthquakes in that country.

[244] INA § 244(f), 8 U.S.C. § 1254(f).

[245] A current list of countries that have received TPS designation by the Secretary can be found on the USCIS website: USCIS, *Temporary Protected Status*,

Clients who are granted TPS receive written notification of such a grant. The form on which a client requests TPS is USCIS Form I-821, so the written approval notice will mention approval of that form. Additionally, TPS recipients will usually have an EAD. The category on the EAD indicating that the client is a TPS recipient is § 274a.12(a)(12).

If you have a client who has received TPS, you must analyze his or her case differently in terms of deportation risks from other clients. TPS recipients will lose their TPS status if they are convicted of (1) any felony, (2) two or more misdemeanors, or (3) a "particularly serious crime."[246]

2. Applicants for Immigration Benefits (and Documents).

As a general proposition, most non-citizens who have applied for immigration benefits are permitted to remain in the U.S. until the USCIS adjudicates their eligibility for the immigration benefits for which they have applied. Examples are clients who have applied for adjustment of status (*inter alia*, those who have married U.S. citizens and have applied to get their green cards), those who have filed applications for asylum, and those who have filed applications for benefits under the Nicaraguan and Central American Relief Act (NACARA),[247] among others. The mere filing of an application for immigration benefits does not confer immigration status on a client, but again, as a practical matter, most clients are permitted to remain in the U.S. until the benefit application is adjudicated.

If a client has filed an application for immigration benefits, she or he should have a receipt from the USCIS (USCIS Form I-797C) indicating that the application has been received. An example of a receipt notice can no longer be found on the USCIS website, but can be found with a Google search.[248] In some cases, an applicant for benefits is authorized to seek employment authorization and will have an EAD.[249]

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https://www.uscis.gov/humanitarian/temporary-protected-status (last visited June 2, 2021).

[246] INA § 244(c)(2)(B), 8 U.S.C. § 154a(c)(2)(B). *See* Section V.E.2., *infra*, for a discussion of what constitutes a "particularly serious crime."

[247] Pub. L. No. 105-100, 111 Stat. 2193 (Nov. 19, 1997).

[248] See, for example, Lirian J. Rosenfeld, *Getting Your Green Card - I-797 Approval Notice Stage,* PassRight, https://www.passright.com/green-card-i797-approval-notice/ (last visited June 2, 2021).

[249] For example, applicants for adjustment of status may receive employment authorization pursuant to 8 C.F.R. § 274a.12(c)(9). Applicants for NACARA benefits can receive employment authorization under § 274a.12(c)(10). Applicants for asylum can, after their applications have been pending for at least 150 days, receive employment authorization

3. Deferred Action Recipients (and Documents).

Deferred action is essentially a grant of administrative discretion by which an otherwise removable non-citizen will not be removed from the U.S. Those who are granted deferred action do not have any sort of permanent status, but even though they are otherwise removable from the U.S., they will not be removed. In addition, they are eligible to apply for work authorization.[250]

The current state of deferred action is, to put it charitably, in disarray. The most recent memo from DHS addressing the issue of deferred action was a November 20, 2014, memorandum by the Secretary of DHS, the Secretary briefly reviews the history of deferred action.[251] Since granting deferred action is a matter of discretion, there was historically no official form on which application for it was made. Instead, the request for deferred action was, in most cases, directed to the local district director of the USCIS or ICE.[252] That is still the case with "generic" forms of deferred action, but other types of deferred action have become more formalized.

a. Deferred Action for Childhood Arrivals (DACA).

Given how much it has been in the news for the past several years, this is probably the most well-known type of "formal" deferred action. It was established in 2012, and essentially amounts to a grant of deferred action to a group of individuals who have been deemed to be of very low priority for removal from the U.S.

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under § 274a.12(c)(8).

[250] 8 C.F.R. § 274a.12(c)(14).

[251] U.S. Dep't of Homeland Sec., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents,* https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_1.pdf (last visited June 2, 2021). The memorandum, along with the companion enforcement priority memo issued by Secretary Johnson on the same day, are must-reads, not only because of the background they give of deferred action, but also because of the discussion of ICE's current removal priorities. The enforcement priority memo of the same date can be found at: U.S. Dep't of Homeland Sec., *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion_0.pdf (last visited June 2, 2021).

[252] Legacy INS used to have an Operations Instruction (O.I. 244.1a(22)) setting forth guidelines to consider in determining whether to grant deferred action. Although that O.I. was repealed in 1997, deferred action still exists.

DACA recipients request deferred action by filing USCIS Form I-821D. A grant of DACA deferred action is indicated on USCIS Form I-797, which looks much like the receipt notice, Form I797C, discussed in the previous section of this Guide. In addition, DACA recipients are eligible to receive an EAD, with category (c)(14) indicated on the face of the EAD.

The details of the DACA program, together with the application process, are available on the USCIS website.[253]

As with TPS recipients, if your client is a DACA recipient, the immigration consequences of any criminal convictions must be analyzed differently. DACA recipients can lose their status if they are convicted at any time of a felony, a "significant misdemeanor," or of three or more misdemeanors of any type. They can also lose their status if they otherwise pose a threat to national security or public safety.[254]

b. VAWA Deferred Action.

If an abused spouse, child or parent of an LPR files a self-petition in order to obtain permanent resident status on his or her own, without the assistance of the abuser,[255] and if the petition is approved but the petitioning victim cannot immediately obtain a permanent resident card because a visa number is not available due to visa quota limits,[256] USCIS will normally grant the beneficiaries of such petitions deferred action and employment authorization until a visa number becomes available to the

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[253] USCIS, *Consideration of Deferred Action for Childhood Arrivals (DACA)*, https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca (last visited June 11, 2021).

[254] As set forth on the website cited in the previous footnote, for purposes of DACA, a "significant misdemeanor" is a crime that is a misdemeanor as defined by federal law (specifically, one for which the maximum term of imprisonment authorized is one year or less but greater than five days) **and** (1) regardless of the sentence imposed, is an offense of domestic violence, sexual abuse or exploitation, burglary, unlawful possession or use of a firearm, drug distribution or trafficking, or, driving under the influence; **or** (2) if not an offense listed in (1) above, is one for which the individual was sentenced to time in custody of more than 90 days. The sentence must involve time to be served in custody, and therefore does not include a suspended sentence.

[255] *See* INA § 204(a)(1)(B)(ii), 8 U.S.C. § 1154(a)(1)(B)(ii).

[256] This would only be the case where the abusing spouse or parent is a LPR, since there is no visa waiting period for spouses or minor children of U.S. citizens.

VAWA recipient.[257] A recipient of this type of deferred action will also have a Form I-797, indicating that she has been granted deferred action. She may also have an EAD under category (c)(14).

c. Prosecutorial Discretion/Administrative Closure.

Another type of case in which it used to be possible to see a grant of deferred action were cases in which a client in removal proceedings had been granted prosecutorial discretion/administrative closure by ICE. The contours of this type of deferred action were discussed in the priorities enforcement memo issued by DHS Secretary Johnson on November 20, 2014. However, by virtue of President Trump's Executive Order 13768, issued on January 25, 2017,[258] former Secretary Johnson's memo has been rescinded. On May 27, 2021, ICE's Office of Principal Legal Advisor (OPLA), issued a memorandum regarding ICE's new enforcement and removal priorities.[259] As you can see, the status of deferred action, as it relates to enforcement priorities of ICE, varies widely depending on who is running the show.

One form that prosecutorial discretion has taken with respect to clients involved in removal proceedings is "administrative closure." Under this arrangement, an immigration judge could order a case to be administratively closed, meaning that it would remain pending on the court's docket, but would be in a state of perpetual continuance – in other words, it would not be put back on the court's active docket absent an affirmative order from the court. However, the status of administrative closure was dealt a severe blow as the result of a decision authored by Attorney General Sessions in *Matter of Castro-Tum*.[260] In that opinion, the Attorney General found no legal authority for the general program of administrative closure, and forbade Immigration Judges from granting administrative closure except in cases where it is authorized by a

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[257] INA § 204(a)(1)(D)(i)(II), 8 U.S.C. § 1154(a)(1)(D)(i)(II). *See also* the very brief explanation under the "Working in the United States" tab on the USCIS VAWA site: USCIS, *Battered Spouse, Children and Parents*, https://www.uscis.gov/humanitarian/battered-spouse-children-and-parents (last visited October 12, 2020).

Although this proposed amendment to the Adjudicator's Field Manual has not been formally adopted, it is still USCIS' policy to grant deferred action to LPR VAWA applicants.

[258] 82 Fed. Reg. 8799 (Jan. 25, 2017).

[259] https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf (last visited June 11, 2021).

[260] 27 I&N Dec. 271 (AG 2018).

regulation or a previously judicially-approved settlement agreement. Although the legal reasoning in this opinion is shaky, and, as of this writing, at least two circuit courts have overruled *Castro-Tum*,[261] it remains controlling law at the BIA level as well as in those circuits that have not yet addressed its rationale.

In his opinion in *Castro-Tum*, the Attorney General realized that requiring re-calendaring of all administratively-closed cases would overwhelm the Immigration Courts.[262] Despite the holding of *Castro-Tum*, there are some cases that do remain administratively closed, pursuant to ICE policy recognizing grants of deferred action in certain situations.[263]

As with TPS recipients, it is important to analyze the immigration risks of criminal proceedings differently for this group than for other types of non-citizens. Since the exercise of prosecutorial discretion is, well, discretionary, it is likely that any type of criminal conviction will imperil the ability of someone to continue to receive deferred action as the result of prosecutorial discretion or administrative closure.

Recipients of deferred action should have a letter or some sort of communication from ICE stating that they have been approved for deferred action. Additionally, most recipients of deferred action will have an EAD, with the category (c)(14) noted on the EAD.

Recipients of administrative closure should have a copy of an Immigration Judge's order granting them administrative closure. In such cases, it is important to determine what type of relief from removal, if any, those clients had pending when their removal cases were administratively closed. For example, some clients may have been pursuing defensive asylum claims when their removal cases were administratively closed. In such cases, you will need to be sensitive to the way in which a criminal case will affect their continued ability to pursue their asylum case (along with the attendant employment authorization).

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[261] *Romero v. Barr*, 937 F.3d 282 (4th Cir. 2020); *Meza Morales v. Barr*, 973 F.3d 656 (7th Cir. 2020).

[262] 27 I&N Dec. at 292.

[263] For example, ICE has indicated that it will not seek re-calendaring of administratively-closed removal cases where U visa applicants have been granted deferred action by USCIS. Immigration & Customs Enforcement, *Revision of Stay of Removal Request Reviews for U Visa Petitioners*, https://www.ice.gov/factsheets/revision-stay-removal-request-reviews-u-visa-petitioners#wcm-survey-target-id (last visited October 12, 2020).

4. Voluntary Departure Recipients (and Documents).

Non-citizens may be granted voluntary departure, either before removal proceedings are commenced against them, during proceedings, or at the conclusion of proceedings.[264] Those granted voluntary departure have agreed to depart the U.S. by a certain date, in lieu of either being placed into removal proceedings or in lieu of having a removal order entered against them. A grant of voluntary departure is advantageous to most non-citizens since being placed in removal proceedings or being ordered removed by the Immigration Court carries certain penalties with regard to future attempts to enter the U.S.[265] Leaving as a result of voluntary departure carries fewer, if any, such penalties.

Those who have been granted voluntary departure will have some type of documentation of that fact, either issued by a USCIS or ICE officer, or perhaps by an Immigration Judge. Most of those granted voluntary departure are not eligible to receive an EAD.[266]

5. Cancellation of Removal Recipients (and Documents).

Certain non-citizens who are in the U.S. without documentation are eligible, in the course of removal proceedings,[267] to apply for a form of relief from removal called "Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents."[268] Available solely as a defense to removal proceedings, this relief, if granted, confers permanent resident status on a previously undocumented person.[269]

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[264] INA § 240B, 8 U.S.C. § 1229c.

[265] For example, a non-citizen in the U.S. who is ordered removed generally is barred from re-entering the U.S. for a period of 10 years. INA § 212(a)(9)(A)(ii), 8 U.S.C. § 1182(a)(9)(A)(ii).

[266] Individuals granted "extended" voluntary departure or voluntary departure under the Family Unity Program are eligible to receive an employment authorization document. *See* 8 C.F.R. § 274a.12(a)(11) and (13).

[267] Removal proceedings used to be called deportation or exclusion proceedings, depending on the client's status at the time such proceedings were begun. *See* the discussion at section IV.A.1., *infra*.

[268] INA § 240A(b), 8 U.S.C. § 1229b(b).

[269] There is also a form of cancellation relief available to permanent residents who are in removal proceedings. *See* INA § 240A(a), 8 U.S.C. § 1229b(a). That type of cancellation is not discussed here since, if a permanent resident receives this type of relief, she or he will simply maintain status as a permanent resident and therefore will have an I-551 ("green card") to

A previously undocumented person who has received a grant of cancellation of removal will have a written decision from an Immigration Judge granting such relief. As mentioned earlier, the grant of relief makes the person an LPR. The format of the written decision will be similar, if not identical, to that of a written decision granting a defensive asylum application.[270] Eventually, the person will receive a Permanent Resident Card (I-551), but that may take some time to process administratively after the hearing before the Immigration Judge.

Because a non-citizen is authorized to work incident to status as an LPR, she or he cannot obtain an EAD. The person may have an EAD in his or her possession that was issued while the cancellation application was pending. If so, the regulatory category on the EAD would be § 274a.12(c)(10).

6. Those Released on Orders of Supervision (OSUP) (and Documents).

Some respondents who have been in removal proceedings have had final orders of removal entered against them, but nevertheless cannot be removed to their home country by ICE, normally because ICE cannot secure travel documents from the appropriate foreign governments. Clients from South Sudan, Laos, and Somalia are examples of those who may face this situation, because governments of those countries either repatriate very few of their citizens each year from the U.S., or repatriate none at all.

Some in this situation are eligible for release from ICE custody under what ICE calls an "order of supervision (OSUP)."[271] This is similar to an OR bond in the criminal context –- such individuals are released into the community but are required to report to ICE on a periodic basis so that ICE can keep track of them. Individuals who have been released under orders of supervision are authorized to apply for an EAD.[272] Obviously, such persons have no formal immigration status in the U.S., but are here simply until such time as their removal from the U.S. can be accomplished.

Individuals released under orders of supervision will have some documentation from ICE granting their request to be released. Also, as indicated above, they will likely have an EAD with the regulatory category of § 274a.12(c)(18).

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document that status.

[270] *See* section III.H.2., *supra*.

[271] INA § 241(a)(3), 8 U.S.C. § 1231(a)(3). *See also Zadvydas v. Davis*, 533 U.S. 678 (2001), for a discussion of the constitutional limitations on indefinite detention of individuals who cannot be removed to their home countries.

[272] 8 C.F.R. § 274a.12(c)(18).

The analysis of immigration consequences of criminal convictions for those in this category is different than that for other types of non-citizens. Since those who have received an OSUP from ICE must check in with ICE periodically, ICE will monitor their criminal history. Any type of conviction may jeopardize their ability to remain out of custody on an OSUP.

7. Individuals Granted Stays of Removal (and Documents).

There are several scenarios in which a non-citizen might have been ordered removed from the U.S., but is the beneficiary of a stay of the removal order. Some examples follow.

--A respondent in removal proceedings who has received a negative decision from an Immigration Judge has the right to file an appeal to the BIA, which, in most cases, is the last stop administratively.[273] In such instances, there is an automatic stay of removal pending decision of the case by the BIA.[274]

--Respondents who are appealing removal orders to federal court or who are challenging removal orders in some way other than by direct appeal can apply to such courts for stays of execution of the removal order until the case is decided.

--Local directors of ICE have authority to grant administrative stays of removal, usually where significant humanitarian concerns are present.[275]

Obviously, since respondents can be the beneficiaries of stays of removal in many different ways, they could have different documents. And just as obviously, being the beneficiary of a stay of removal does not grant someone any long-term immigration status in the U.S.

J. Undocumented Individuals.

These are individuals who have either entered the U.S. without any documentation at all, without proper documentation, or who initially entered the U.S. with proper

[273] 8 C.F.R. § 1003.1(b). Decisions of the BIA may be referred to the U.S. Attorney General for further review, (8 C.F.R. § 1003.1(h)).

[274] 8 C.F.R. § 1003.6.

[275] 8 C.F.R. §§ 241.6, 1241.6. Recipients of prosecutorial discretion, discussed in section III.I.3.c., *supra*, may have been granted stays of removal.

documentation but have remained beyond the period they were authorized to stay in the U.S.[276]

A frequently-encountered acronym in the area of undocumented individuals is "EWI." These initials stand for "entry without inspection," and are used to describe those individuals who physically entered the U.S. without documents and without being inspected and admitted by a CBP officer at the time of their physical entry.

Obviously, undocumented individuals who entered without inspection will have no legitimate documentation of any kind to verify their status.[277] If they entered with inspection but have remained beyond the time authorized, they will have documents that, on their face, indicate their status has expired. Such individuals are subject to being removed from the U.S. at any time.

IV. REMOVAL PROCEEDINGS.

A. History and Terminology.

The purpose of this section of the Guide is not to turn criminal practitioners into immigration lawyers. Rather, it is to provide some general background and information on the workings of the U.S. immigration system regarding removal proceedings. Hopefully this information will assist criminal law practitioners in advising their non-U.S. citizen clients.

1. Historical Forerunners of Removal Proceedings.

As discussed earlier,[278] Congress made two massive changes to the INA in 1996: the Antiterrorism and Effective Death Penalty Act (AEDPA), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Those

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[276] An example of this last category is a visitor who remains in the U.S. after the period of authorized stay indicated on his or her I-94. In terms of non-immigrants, in most cases the date by which the person must leave the U.S. is indicated on the I-94, which is the document given to the person by a CBP officer at the time of entry into the U.S. A visa (which appears in a non-citizen's passport and which is issued by a U.S. consular officer abroad) is like a permission slip to seek admission to the U.S. The visa may be good for several years beyond its issuance date, but that does not mean the non-immigrant is authorized to stay in the U.S. until the visa expires – that date is found on the I-94.

[277] But they may very well have illegitimate documents indicating that they have some status, either because the documents belong to someone else who has status, or because the documents are fabricated. Depending on the quality of such documents and the honesty of the client, you may not know that they are without documentation. So you have to ask and hope they tell you the truth.

[278] *See* section I.B.1., *supra*.

two Acts, especially IIRIRA, changed both substantive law and terminology in the area of removal proceedings. Before IIRIRA was enacted, there were essentially two types of proceedings in which legacy INS sought either to exclude non-citizens from the U.S. or deport those who were already here: exclusion proceedings and deportation proceedings.

a. Exclusion Proceedings.

In exclusion proceedings, legacy INS sought to exclude people from the U.S. who were seeking entry into the country. These proceedings were used if a person had not yet physically entered the U.S. In essence, exclusion proceedings were used to keep people out who were at ports of entry but whom legacy INS believed were excludable because a provision of law did not permit them to enter the U.S.[279] Exclusion proceedings were also used in cases where immigrants had been paroled into the U.S. but had not been formally admitted.[280] In such cases, parolees were not considered to have effected an entry into the U.S. and were therefore subject to exclusion proceedings. Although non-citizens were entitled to hearings in exclusion proceedings, the procedural safeguards were not as stringent as those in deportation proceedings, since such non-citizens had not yet entered the U.S.

b. Deportation Proceedings.

The second type of proceeding was known as a deportation proceeding, in which legacy INS sought to deport someone from the U.S. who had already physically entered the country. Thus, people who were physically present in the U.S., regardless of whether they had entered legally or not, were put into deportation proceedings if they were deportable under existing law.[281] One who had physically entered the U.S. and who was deportable was entitled to a deportation proceeding regardless of how many times she or he had previously been deported.

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[279] The grounds of exclusion were formerly found in § 212(a) of the INA (8 U.S.C. § 1182), and included things such as certain communicable diseases, certain crimes, being Nazi persecutors, and so forth.

[280] *See* section III.F., *supra*, for a discussion of the concept of "parole."

[281] The grounds of deportation in the statute, then found at § 241 of the INA (8 U.S.C. § 1251), included those who had entered the U.S. without documents, those who had been convicted of certain crimes, those who had overstayed their periods of authorized stay, and so forth.

Deportation proceedings, although still administrative proceedings, were more formal procedurally than exclusion proceedings, and afforded respondents more due process rights than did exclusion proceedings.

2. Current Terminology.

Since April 1, 1997, all proceedings either to keep someone out of the U.S. who wants to enter or to remove someone who has already entered are called by one name: "removal" proceedings.[282] Although IIRIRA was signed into law on September 30, 1996, most of its provisions did not become effective until April 1, 1997. Therefore, generally speaking, pre-IIRIRA law applies to clients whose exclusion or deportation cases were filed before April 1, 1997, and post-IIRIRA law applies to clients whose removal cases were initiated on or after April 1, 1997. The discussion in later sections of this Guide is based on post-IIRIRA law.

Why bother with this discussion? Because, although proceedings now have only one name, there are still substantive differences between grounds that make a person "inadmissible" (i.e., a person who either has never entered the U.S. or has physically entered, but without being inspected and given permission to enter), and those that make a person "deportable" (i.e., someone who entered legally and with inspection). And, depending on your client's immigration status, she or he may have to worry only about grounds of inadmissibility, only about grounds of deportability, or, potentially, about both.[283] Today, the grounds of "deportability" are found in INA § 237 (8 U.S.C. § 1227), while the grounds of "inadmissibility" are found in INA § 212 (8 U.S.C. § 1182).

Here is another important point: IIRIRA changed the definition of "entry." To be precise, it eliminated this term from the INA and replaced it with the concept of "admission." With the advent of IIRIRA, a client who has physically entered the U.S. "illegally" (i.e., without documents and without being inspected by a CBP officer) has not, under post-IIRIRA law, effected a legal entry.[284] Therefore, such a person, even if encountered in the interior of the U.S., will be charged with being inadmissible under § 212(a) of the INA[285] rather than with being "deportable" under § 237 of the INA.[286] **As a result, if you are representing a non-citizen client who has entered the U.S. without inspection,**

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[282] *See, e.g.*, INA § 240, 8 U.S.C. § 1229a.

[283] *See* the discussion in section V.B.2., *infra*.

[284] *See* INA § 101(a)(13), 8 U.S.C. § 1101(a)(13). The statute also sets forth other occasions on which a person is deemed to be seeking "admission" to the U.S.

[285] 8 U.S.C. § 1182.

[286] 8 U.S.C. § 1227.

your analysis of immigration consequences should focus on § 212 of the INA, rather than on § 237.

B. Removal Proceedings.

At present, there are essentially five different types of removal proceedings: "regular" removal proceedings, administrative removal proceedings, reinstatement removal proceedings, judicial removal proceedings, and expedited removal proceedings. Each type of proceeding is summarized below.

1. Regular Removal Proceedings.[287]

"Regular" removal proceedings are those removal proceedings that will be heard before an Immigration Judge pursuant to § 240 of the INA.[288] This is the type of removal proceeding that clients in Nebraska most likely will encounter.

The statute provides, *inter alia*, that Immigration Judges shall conduct proceedings for deciding the inadmissibility or deportability of a non-citizen under INA §§ 212(a) and 237(a), respectively.[289] Thus, a client who is physically present in the country, whether or not the client has been "admitted" to the U.S., will most often face an Immigration Judge, who will determine whether or not the client should be removed from the U.S. pursuant to any of the listed statutory grounds. Following is a summary outline of the procedures involved in a § 240 removal proceeding.

a. Initiation of Proceedings.

Although several officials have authority to place an individual in § 240 removal proceedings,[290] most often it is an ICE officer working for the local Field Office who does so. One is placed in removal proceedings by the issuing of a Notice to Appear (NTA).[291] Unless the respondent

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[287] The Immigration Court Practice Manual is an excellent source of information about the nuts and bolts of practice before Immigration Courts. It can be found on the EOIR website: https://www.justice.gov/eoir/office-chief-immigration-judge-0 (last visited October 12, 2020).

[288] 8 U.S.C. § 1229a.

[289] INA § 240(a), 8 U.S.C. § 1229a(a).

[290] 8 C.F.R. §§ 239.1(a), 1239.1(a).

[291] INA § 239, 8 U.S.C. § 1229. One example of a NTA is found at https://immigrantjustice.org/for-attorneys/legal-resources/file/sample-notice-appear (last visited October 12, 2020).

consents to being removed from the U.S. without benefit of a hearing,[292] the issuance of an NTA begins a string of events that will result in an Immigration Judge determining whether or not the person is inadmissible to or deportable from the U.S.

b. Detention During Proceedings.

ICE has the authority to detain anyone who is placed in removal proceedings, and is required to detain certain individuals who are in proceedings.[293] Because the issues of pre-hearing and post-hearing detention are complicated, they are discussed more fully in a later section.[294]

c. Master Calendar Hearing.

The first hearing at which the allegations in the NTA are addressed is the Master Calendar Hearing.[295] At this hearing, the non-citizen is expected to respond, by admission or denial, to each of the factual allegations in the NTA, as well as to the charge(s) of inadmissibility or deportability.

Master Calendar Hearings are akin to docket calls -- several hearings are scheduled for each session. Immigration Judges determine the order in which they wish to call the cases, usually beginning with those who are represented by counsel.

Unless the hearing is being conducted by an Immigration Judge who is not on site, whichever Immigration Judge is hearing the case will be present in

[292] INA § 240(d), 8 U.S.C. § 1229a(d).

[293] INA § 236(a) and (c), 8 U.S.C. § 1226(a) and (c).

[294] *See* section IV.C., *infra*.

[295] There can be a long lapse of time between the issuance of a NTA and the time of the Master Calendar Hearing, at least for those clients who are not detained by ICE. Most NTAs, when first issued, do not even contain a date or time for the Master Calendar Hearing, instead indicating that the date and time are "To Be Set." This is because although (normally) an ICE officer issues the NTA, the Immigration Court schedules the Master Calendar Hearings, and the NTA-issuing officer does not have access to the Immigration Court's docket calendar. For non-detained cases (see section IV.C., *infra*, for a discussion of detention issues), initial Master Calendar Hearings can take place well after the NTA is issued.

person in one of the courtrooms.[296] If a person is not represented by counsel, the judge normally will, at the person's request, continue the Master Calendar Hearing to give him or her an opportunity to secure counsel.[297] Although a non-citizen has a statutory right to be represented by counsel, such representation must be at no expense to the government.[298] If the respondent is represented by counsel, counsel can file a motion with the appropriate Immigration Judge requesting that the Master Calendar Hearing be held by conference call among the Immigration Judge, the District Counsel, and the respondent's counsel, thus obviating the need for the respondent's physical presence in Omaha. However, unless the Immigration Judge specifically waives the respondent's appearance at the hearing, he or she must be present in counsel's office.

If, at the Master Calendar Hearing, the respondent neither contests the fact that she or he is inadmissible/deportable nor seeks any waiver of inadmissibility or relief from deportation, the Immigration Judge will enter an order finding the respondent removable (inadmissible or deportable, depending on the situation). In such a case, the respondent would usually waive appeal and the order would become final and enforceable immediately. The ICE District Office is charged with enforcing such an order. ICE officials may take the respondent into custody very soon after the hearing concludes or allow him or her some time to report for removal, depending on the equities of the situation.[299]

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[296] The Immigration Court entry is on the north side of the USCIS/ICE building in Omaha. More information on the Court can be found on the EOIR website: https://www.justice.gov/eoir/omaha-immigration-court (last visited June 11, 2021).

[297] The statute (INA § 239(b)(1), 8 U.S.C. § 1229(b)(1)) provides that a Master Calendar Hearing shall not be held sooner than 10 days after the service of the NTA, so that a respondent has an opportunity to secure counsel. In the Omaha District, hearings involving non-detained respondents rarely happen immediately after the 10-day period. In the event they do, the judges have historically been very reasonable about continuing the hearing to allow the person the chance to secure representation.

[298] INA § 292, 8 U.S.C. § 1362.

[299] Although discussion of the equities considered by ICE is beyond the scope of this Guide, they generally coincide with the types of equities that will result in a favorable bond determination in a criminal law context: i.e., ties to the community, background of the client, financial circumstances, and so forth. Obviously, the primary concern of ICE is that the person will actually report for removal when the time comes.

d. Individual Calendar (Merits) Hearing.

If the respondent either (1) denies any of the essential factual allegations, or the charge(s) of inadmissibility/deportability in the NTA, or (2) admits that she or he is inadmissible or deportable but seeks either a waiver of inadmissibility or some other form of relief from removal, the Immigration Judge will schedule an Individual Calendar Hearing, also known as a Merits Hearing. At this hearing, the issues raised by either the denial(s) or the request(s) for waiver/relief will be resolved.

Individual Calendar Hearings are scheduled for dates and times certain -- the date and time are reserved solely for the individual respondent's case. At this stage of the proceedings, there will be another delay. Depending on the nature of the case, the complexity of the issues involved, the time required for the presentation of evidence, and the judge involved, it may be a year or longer between the final Master Calendar Hearing and the Individual Calendar Hearing in cases in which the respondent is not detained (i.e., held in custody) by ICE.

Individual Calendar Hearings are essentially short trials at which exhibits are offered and testimony taken on the issue(s) under consideration. Pursuant to the Immigration Court Practice Manual, counsel must submit supporting documents and briefs to the Immigration Judge at least 15 days before the Individual Calendar Hearing.[300] Because the proceedings are administrative, the formal Federal Rules of Evidence do not apply at the hearing.

Frequently, the Immigration Judge announces his or her decision on the same day the Individual Calendar Hearing takes place. Both the non-citizen respondent and ICE may have the right to appeal the Immigration Judge's decision administratively and/or judicially, depending on the type of case.

2. Administrative Removal Proceedings.

Administrative removal proceedings are those that take place pursuant to § 238(b) of the INA.[301] Such proceedings are used by ICE against those who are either

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[300] Immigration Court Practice Manual, § 3.1(b)(ii).

[301] 8 U.S.C. §1228(b).

not LPRs or who have Conditional Permanent Resident status (CPR)[302] **if** such individuals have been convicted of an aggravated felony.[303]

Administrative removal proceedings are begun when the appropriate federal officer issues a Notice of Intent to Issue a Final Administrative Deportation Order (Notice of Intent) and serves it on the non-citizen.[304] The facts that must be present in order to permit the use of administrative removal are limited, and will be cited in the Notice of Intent: (1) the person is, in fact, an non-citizen, (2) the person is not an LPR or is a CPR, (3) the person has been convicted of an aggravated felony and such conviction is final,[305] and (4) the person is deportable as a result of the aggravated felony conviction.[306] The Notice of Intent is issued on Form I-851.[307]

The respondent has 10 calendar days from the date the Notice of Intent is served on him or her (13 calendar days if service is by mail) to respond to the Notice.[308] If there is no timely response, or if the respondent concedes that she or he is deportable, then the officer issues a Final Administrative Removal Order on Form I-851A.[309] The removal order can be executed once 14 days pass, unless the respondent waives the 14-day waiting period.[310]

If the person submits a timely response to the Notice of Intent contesting some of the facts, the issuing officer must decide whether, nevertheless, the charges in the Notice of Intent are sustained by clear, convincing and unequivocal evidence in the record. If the issuing officer makes that determination, she or he issues the Final Administrative Removal Order.[311] If, on the other hand, the non-citizen's

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[302] INA § 238(b)(2), 8 U.S.C. § 1228(b)(2). *See* section III.D., *supra*, for a discussion of Conditional Permanent Resident status.

[303] INA § 238(b)(1), 8 U.S.C. § 1228(b)(1). *See* section V.D.6., *infra*, for a discussion of what crimes constitute an aggravated felony.

[304] 8 C.F.R. § 238.1(b)(1).

[305] *See* section V.D.2., *infra*, for a discussion of the term "conviction" under the INA.

[306] 8 C.F.R. § 238.1(b)(1).

[307] *Id*.

[308] 8 C.F.R. § 238.1(c)(1).

[309] 8 C.F.R. § 238.1(d)(1).

[310] 8 C.F.R. § 238.1(f)(1).

[311] 8 C.F.R. § 238.1(d)(2)(i).

response raises a genuine issue of material fact, then the officer may either obtain additional evidence or convert the proceedings into "regular" removal proceedings under § 240 of the INA.[312] If the officer finds that the person is not amenable to removal under § 238(b), then she or he must terminate the administrative removal proceedings finally and, where appropriate, begin "regular" removal proceedings under § 240.[313]

3. Reinstatement Removal Proceedings.

Section 241(a)(5) of the INA (8 U.S.C. § 1231(b)(5)) provides that if an non-citizen physically re-enters the U.S. without authorization after having been previously ordered removed, or after having voluntarily departed under an order of removal, she or he is not entitled to a "new" removal proceeding. Instead, the previously-entered removal order is reinstated from its original date. It cannot be reopened or reviewed in any way, nor can a non-citizen apply for any relief from the reinstated removal order, with very limited exceptions.

This means, as the regulation details,[314] that a person subject to reinstatement removal proceedings has no right to a hearing before an Immigration Judge. The issues in a reinstatement proceeding are very limited: (1) was the person subject to a prior removal order? (2) is this the same person who was previously ordered removed? and (3) did the person re-enter the U.S. without authorization? If these three elements are established, then the person will be removed by reinstating the previous removal order, unless she or he is eligible for benefits under the Haitian Refugee Immigrant Fairness Act of 1998,[315] the Nicaraguan and Central American Relief Act,[316] or has a reasonable fear of persecution or torture in the country to which he or she will be removed.[317]

4. Judicial Removal Proceedings.

Section 238(c)[318] of the INA (8 U.S.C. § 1228(c)) lays out a procedure by which

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[312] 8 C.F.R. § 238.1(d)(2)(ii).

[313] 8 C.F.R. § 238.1(d)(2)(iii).

[314] 8 C.F.R. § 241.8.

[315] Section 902, Div. A, Pub. L. No. 105-277, 112 Stat. 2681 (Oct. 21, 1998).

[316] Section 202, Pub. L. No. 105-100, 111 Stat. 2160 (Nov. 19, 1997).

[317] 8 C.F.R. § 241.8(d) and (e).

[318] Because of a Congressional drafting mistake, there are actually two sections 238(c) in the INA. This discussion involves the second of those two sections.

United States District Courts can enter removal orders against deportable non-citizens. Originally enacted in 1994 as part of the Immigration and Nationality Technical Amendments Act,[319] section 238(c) was again amended by AEDPA and IIRIRA in 1996.

As it currently stands, § 238(c) allows a U.S. District Court judge to enter a judicial order of removal against one who is deportable under § 237(a)(2)(A) of the INA. The statute lays out the procedure that must be followed, which includes the filing, by the U.S. Attorney's office, of a notice of intent to request judicial removal. Such a notice must be filed before the beginning of a trial or entry of a guilty plea.[320] An additional filing, containing the factual allegations regarding alienage and identifying the crimes that make the person deportable, must be made at least 30 days before the date for sentencing.[321]

A district court can consider requests for relief from removal by the respondent.[322] If the request for a judicial order of removal is denied by the district court, ICE can still seek a removal order through administrative proceedings, which can include the basis for the removal order sought from the district court.[323]

5. Expedited Removal Proceedings.

Expedited removal proceedings are those conducted pursuant to the provisions of INA § 235.[324] Historically, these proceedings were used only with respect to those encountered at or within 100 miles of ports of entry, and therefore most non-citizens in Nebraska were not subject to expedited removal proceedings. But the Trump Administration sought to change that practice. [325]

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[319] Pub. L. No. 103-416, 108 Stat. 4322 (Oct. 25, 1994).

[320] INA § 238(c)(2)(A), 8 U.S.C. § 1228(c)(2)(A).

[321] INA § 238(c)(2)(B), 8 U.S.C. § 1228(c)(2)(B).

[322] INA § 238(c)(2)(C), 8 U.S.C. § 1228(c)(2)(C).

[323] INA § 238(c)(4), 8 U.S.C. § 1228(c)(4).

[324] 8 U.S.C. § 1225.

[325] On July 23, 2019, the DHS published notice of its intention to expand expedited removal to apply to all persons who cannot prove that they have been in the United States for at least two years, regardless of where they are encountered in the U.S. by ICE. This is a significant expansion of the use of expedited removal proceedings. As of this writing, the Biden Administration has not provided any further information on how or whether it will implement this policy.

The main differences between "regular" removal proceedings under § 240 and expedited removal proceedings under § 235 are the speed at which the proceedings move, the formality of the proceedings, and the right to appeal negative decisions.

Expedited removal proceedings can apply to those who are physically present in the U.S., but who did not enter with inspection (EWIs).[326] Nevertheless, if an EWI client can demonstrate to the appropriate federal officer that she or he has been physically present in the U.S. for a period of at least two years, then the expedited removal procedures will not apply.[327] Expedited removal proceedings do not apply to those who are natives or citizens of countries in the Western Hemisphere with whose government the U.S. does not have full diplomatic relations and who arrive by aircraft at a port of entry.[328]

The essence of expedited removal proceedings is that the federal officer examining either (1) an arriving non-citizen, or (2) a person who EWI'd who does not convince such officer that she or he has been in the U.S. for at least two years, can order that person removed from the U.S. without further hearing or review if the officer finds the person to be inadmissible because of document fraud or because such person has no valid entry documents.[329] If such a person expresses a desire to apply for asylum, the examining officer must refer the person to an asylum officer for a determination of whether he or she has a "credible fear" of persecution that might qualify him or her for a grant of asylum.[330]

Except with respect to those who claim asylum or who claim to be permanent residents of the U.S., there is no right of administrative appeal from an order of removal under § 235, and collateral attacks on such orders are also restricted.[331] There are slightly modified procedures that apply to those whom the inspecting officer believes are inadmissible on the basis of security and related grounds.[332]

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[326] INA § 235(a)(1), 8 U.S.C. § 1225(a)(1).

[327] INA § 235(b)(1)(A)(iii)(I) and (II), 8 U.S.C. § 1225(b)(1)(A)(iii)(I) and (II).

[328] INA § 235(b)(1)(F), 8 U.S.C. § 1225(b)(1)(F).

[329] INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i).

[330] INA § 235(b)(1)(A)(ii), 8 U.S.C. § 1225(b)(1)(A)(ii).

[331] INA § 235(b)(1)(C) and (D), 8 U.S.C. § 1225(b)(1)(C) and (D).

[332] INA § 235(c), 8 U.S.C. § 1225(c).

C. Detention of Non-Citizens.

The INA and implementing regulations discuss when and under what conditions ICE may or must detain non-citizens in its custody. The provisions regarding detention of non-citizens vary depending on the category of non-citizen involved and the stage of immigration proceedings in which the non-citizen is involved. For example, those arriving at ports of entry, those charged with crimes, those convicted of crimes, and suspected terrorists all are subject to being detained by DHS officials under various statutory provisions. And, depending on the situation, such individuals can be detained before removal proceedings are begun, during the pendency of proceedings, or after the conclusion of proceedings. Because few Nebraska practitioners will deal with clients who are arriving at a port of entry or are suspected terrorists, this discussion focuses on detention of those already present in the U.S. who have been either charged with or convicted of crimes.

The statutory and regulatory provisions regarding detention of non-citizens are complex, and have been the subject of a number of legal challenges in the courts, both on constitutional and statutory bases. The discussion here of detention provisions and procedures is necessarily truncated, since it is not the goal to explore all the nuances of detention in the immigration system. Rather, the hope is to provide basic information to criminal law practitioners in order to help them understand, in a general way, how the DHS detention process works and how that process might impact strategy decisions to be made in the context of representing a non-citizen in a criminal case.

1. Detention Before Commencement of Immigration Proceedings.

Generally speaking, only federal officers can arrest and detain non-citizens who are suspected of being immigration violators.[333] Although the INA has a provision allowing the federal government to enter into written agreements with state authorities to arrest and detain suspected immigration violators,[334] no such agreement exists in Nebraska at the present time.

From 2008-2014, ICE instituted its "Secure Communities" program. In 2014, Secure Communities was replaced by the "Priority Enforcement Program." That program, like its predecessor, was essentially a data sharing initiative. All individuals booked by local law enforcement agencies were fingerprinted, and those fingerprints were sent to the FBI's data base. Under the Priority Enforcement Program, the FBI automatically sent fingerprints in its data base to ICE so ICE could check those prints against its data base. Any person identified by ICE through this procedure whom ICE believed was removable from the U.S. was put into removal proceedings. In 2017, the Trump Administration revived

[333] INA § 287(a), 8 U.S.C. § 1357(a).

[334] INA § 287(g), 8 U.S.C. § 1357(g).

the Secure Communities program,[335] but President Biden revoked that Executive Order on the day he took office.[336] So, as usual, things are up in the air.

If a state or local law enforcement agency suspects that a person in its custody may be someone present in the U.S. without proper documentation, that agency normally contacts ICE to see if ICE is interested in interviewing the person. Depending on the perceived exigency of the circumstances and the availability of resources, ICE will either interview the person over the phone or send someone to interview the person in order to determine whether ICE wishes to initiate removal proceedings. There may be occasions on which ICE will indicate to the law enforcement agency that it is not interested in initiating removal proceedings against the person, even if it determines that she or he may be present in the U.S. without authorization, but this is now far less common than it used to be, particularly with the advent of the Trump Administration.

While law enforcement agencies are always free to contact ICE about suspected undocumented individuals they encounter, one provision of the INA requires a response from ICE to inquiries from law enforcement. Section 287(d) of the INA[337] provides that in the case of an individual arrested by a federal, state or local law enforcement agency for a drug offense, if that agency has reason to believe that the person is not lawfully present in the U.S., ICE must "promptly" determine whether or not to issue a detainer to detain such a person, upon the request of the law enforcement agency. However, as mentioned above, the regulations authorize ICE to issue detainers to detain non-citizens in the custody of law enforcement agencies,[338] even if such detainers are not requested by law enforcement, and ICE is doing that with increasing frequency. Current information about ICE detainers, and the form ICE uses to request a detainer, can be found on the ICE website.[339]

ICE detainers are issued by ICE to the custodian or a law enforcement agency holding a non-citizen. They request that the law enforcement agency advise ICE,

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[335] Section 10, Executive Order 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

[336] https://www.federalregister.gov/documents/2021/01/25/2021-01768/revision-of-civil-immigration-enforcement-policies-and-priorities (last visited June 11, 2021).

[337] 8 U.S.C. § 1357(d).

[338] 8 C.F.R. § 287.7.

[339] https://www.ice.gov/identify-and-arrest/detainers/ice-detainers-frequently-asked-questions (last visited June 11, 2021).

before releasing the person, of the person's pending release so that ICE can make arrangements to take custody of the individual.[340]

These forms do not, by their explicit terms, impose any restrictions on the rights of those in state custody to participate in programs offered by the institution in which they are confined. However, as a practical matter, once ICE serves one of these forms on either a state or local law enforcement agency, many institutions have their own policies regarding what types of programs and activities are available to those subject to ICE detainers.[341] The important thing to remember is that any restrictions are caused not by the forms themselves, but instead by the policy of the institution holding someone with respect to whom a form has been issued.

As mentioned above, § 287(d) of the INA[342] only requires action on a requested detainer if the individual is arrested because of a controlled substance violation. Again, however, as a practical matter ICE will now issue request forms to anyone it views as a removal priority. The safest assumption to make is that if your client is being held by state officials and s/he is not a U.S. citizen, ICE is likely to be notified and will proceed to send a detainer form to the state custodian.

If you represent a client in such a situation (i.e., ICE has sent a detainer form to a detention facility in which your client is being held), the analysis of whether to pursue a bond regarding the state charges gets complicated. Here's why. If the client posts a bond on the state criminal case, he will still have to deal with the issue of the ICE request. Once ICE finds out that the client is to be released on a state bond, it will ask local law enforcement to hold the client until it can take the client into custody.[343] "Taking the client into custody" could include ICE asking

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[340] 8 C.F.R. § 287.7(a).

[341] Both immigration and criminal defense attorneys with whom we have spoken relate that clients subject to these ICE notifications in county and state facilities are often ineligible, pursuant to institutional policy, to access such programs as community work release or other programs in which they might otherwise participate. However, a number of Nebraska counties now no longer honor ICE requests, fearing legal liability. At last check, those included Douglas, Hall, Lancaster and Sarpy Counties.

[342] 8 U.S.C. § 1357(d).

[343] The regulation (8 C.F.R. § 287.7(d)) requires a criminal justice agency to hold a client, at ICE request, for a period of not more than 48 hours, excluding holidays and weekends, once ICE has determined to take custody of the client. The Nebraska immigration practitioners to whom we talked reported that the 48-hour rule is not always observed, that is, individuals are frequently held more than 48 hours. Of course, the appropriate legal response to this is to file a habeas corpus action, seeking release of the client. As a practical matter, however, once a habeas action is filed ICE normally issues a Notice to Appear, which thereby cures the illegality

the local law enforcement agency to continue holding the client in the local facility, or it could mean ICE physically removing the client to a federal detention facility located remotely from the county in which the client faces criminal charges.[344]

In any event, the client, having made state bond, then must, if she or he is to be released, post another bond in an amount to be determined by ICE **if** the client is bondable at all.[345] The most favorable outcome is that the client is ICE-bondable, posts the required bond, and is released. Less favorable outcomes include the client's being unable to post the amount of the ICE bond[346] or not being bondable at all. Under these less favorable scenarios, the client will then either continue to sit in the original custodial facility or will be transferred to a remote ICE facility until the removal process sorts itself out. If this comes to pass, the client has essentially wasted the money involved in putting up the state bond.

There is another important factor: if the client bonds out on the state charge but is unable, for whatever reason, to bond out on the immigration charge, the time spent in the custodial facility in ICE custody will not count toward "time served" with respect to any sentence imposed in the underlying state case. So again, whether to advise a client to pursue a bond on a state charge is something that ought to be carefully considered if ICE has placed a detainer on the client.

2. Detention After Commencement of Immigration Proceedings.

Once ICE issues and serves a Notice to Appear on a non-citizen, thereby placing him or her in removal proceedings, ICE will more often than not, in the cases of one who is charged with or convicted of crimes that render him or her removable from the U.S., take the person into custody. The discussion here is divided into two parts: (1) detention of respondents during removal proceedings but before an administrative decision on the removal charges and (2) detention of respondents against whom a final order of removal has been entered.

a. Detention of Respondents During the Pendency of Removal Proceedings.

The enactment of IIRIRA in 1996 drastically changed the rules of the

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of continued detention.

[344] A list of ICE detention facilities can be found at https://www.ice.gov/detention-facilities (last visited May October 13, 2020).

[345] *See* the following section for a discussion of bonds in the immigration context.

[346] All ICE bonds are cash bonds only; no percentage bonds exist.

game regarding detention of non-citizens charged with or convicted of crimes. Section 236 of the INA[347] is the provision of law bearing most directly on detention of individuals during removal proceedings.

Subsection (a) of § 236 provides that ICE can detain a person pending a decision on whether the person is to be removed from the U.S. The statute gives ICE the discretion to release the person either on bond in an amount of at least $1500 or on "conditional parole," which amounts to allowing an individual who is otherwise inadmissible to the U.S. to be present in the U.S. under certain conditions. One released on bond or conditional parole cannot get employment authorization unless he or she is a permanent resident or has some other means of qualifying for an employment authorization document.

Subsection (c) of § 236 is the mandatory detention provision of the INA with which those charged with or convicted of crimes will most often have to deal. That subsection provides, *inter alia*, that those who are either inadmissible or deportable as the result of committing some crimes **must** be detained by ICE and cannot be released except in very limited circumstances.[348]

The only non-citizens involved in criminal proceedings who are **not** subject to the mandatory detention provisions of § 236(c) are the

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[347] 8 U.S.C. § 1226.

[348] INA § 236(c)(1) and (2); 8 U.S.C. § 1226(c)(1) and (2). The limited circumstances under which such individuals can be released essentially include situations in which release is necessary to provide protection to witnesses or those otherwise cooperating with investigations into major criminal activities. There have been two major cases decided by the BIA interpreting § 236(c)(1). The first, *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001), construed the language in the statute that says DHS must take an individual into custody "when the alien is released" from non-DHS custody. The BIA in *Rojas* held that the "when released" language does not require DHS to take the person into custody immediately upon release from incarceration (in *Rojas*, the person had been released from state custody two days before legacy INS took him into custody). The Supreme Court upheld that reading in *Nielsen v. Preap*, 139 S. Ct. 954, 203 L. Ed. 2d 333 (2019), holding that DHS is required to hold, without bond, those who fall under the descriptions in the statute regardless of how much time has passed from the time they were released from state custody until the time they are taken into DHS custody. The second, *Matter of Garcia Arreola*, 25 I&N Dec. 267 (BIA 2010), made it clear that the only persons subject to mandatory detention under § 236(c) are those who were convicted of the types of offenses mentioned in § 236(c)(1)(A)-(D) of the INA (8 U.S.C. § 1226(c)(1)(A)-(D)). In other words, if a person has committed an offense of the type not described in § 236(c)(1)(A)-(D) and has been released from non-DHS custody, he or she is not subject to mandatory detention.

following: (1) those removable under § 237(a)(2)(A)(i)(I)[349] because of a conviction of one crime involving moral turpitude committed within five years of entry for which a sentence of one year or longer could be imposed; (2) those removable under § 237(a)(2)(A)(iv)[350] because of a conviction of a violation of 18 U.S.C. § 758 relating to high speed flight from an immigration checkpoint; and (3) those removable under § 237(a)(2)(E)[351] because of a conviction of a crime of domestic violence, stalking, violation of a protection order or child abuse. Every other person charged with or convicted of a criminal offense is swept into the mandatory detention provisions of § 236(c).

Two points are especially worth making about § 236(c): (1) anyone who has committed a criminal offense described in § 212(a)(2) of the INA[352] and who has not been inspected and admitted to the U.S. must be detained under the provisions of § 236(c). This is because such a person is "inadmissible" under § 212(a) of the INA[353] rather than "deportable" under § 237, and therefore none of the exceptions to mandatory detention apply to such an individual. This would obviously include all EWIs (i.e., those who entered without documentation); and (2) even most permanent residents who find themselves involved in criminal proceedings will be subject to the mandatory detention provisions of § 236(c) of the INA.

The United States Supreme Court has upheld the constitutionality of the mandatory detention provisions of § 236(c). In *Demore v. Kim*, the Court held that Congress was justifiably concerned with assuring that deportable individuals appeared for their removal hearings and that the mandatory detention provisions of § 236(c) did not violate the due process provisions of the Fifth Amendment.[354] One of the factors that the Court found was important in sustaining the constitutionality of § 236(c) mandatory detention is the availability of an administrative "Joseph" hearing in which the detained respondent can present evidence that he or she ought not be subject to mandatory detention.[355] Even in the wake of the *Demore*

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[349] 8 U.S.C. § 1227(a)(2)(A)(i)(I).

[350] 8 U.S.C. § 1227(a)(2)(A)(iv).

[351] 8 U.S.C. § 1227(a)(2)(E).

[352] 8 U.S.C. § 1182(a)(2).

[353] 8 U.S.C. § 1182(a).

[354] *Demore v. Kim*, 538 U.S. 510 (2003).

[355] The "Joseph" hearing is named after the Board of Immigration Appeals precedent

decision, non-citizens may, under certain circumstances, be able to distinguish their cases from the facts in *Demore*, and therefore argue that they ought not be subject to mandatory detention. Such an analysis is beyond the scope of this Guide but is discussed in greater detail by others.[356]

For those detained during the pendency of removal proceedings who are not mandatory detainees under § 236(c), a local ICE officer will determine under what circumstances such individuals may be released. If the ICE officer determines that the person is not a danger to persons or property, and is satisfied that the person is not a flight risk, the officer may authorize release of the person during the pendency of removal proceedings.[357] The statute requires that, unless the person is released on conditional parole, a bond of at least $1500 must be imposed.[358]

Respondents have a right to request that any bond determination made by a local ICE officer be reviewed by an Immigration Judge.[359] There may be occasions when an individual has been taken into ICE custody but ICE has not yet filed the Notice to Appear with the Immigration Court. Although jurisdiction over the removal proceedings only vests in the Immigration Court once the Notice to Appear is filed with the Court,[360] Immigration Judges do have the authority to hear bond matters before the Notice to Appear has been filed.[361]

The types of evidence that Immigration Judges find persuasive in bond review hearings are generally the types of evidence that judges find persuasive in criminal proceedings: employment, length of time in the U.S., community ties, financial situation, family members, prior criminal and/or immigration violations, the nature of any prior crimes and/or immigration violations, and so forth. Additionally, Immigration Judges

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opinion establishing the right to such a hearing. *See In re Joseph*, 22 I&N Dec. 799 (BIA 1999).

[356] *See, e.g.,* Dan Kesselbrenner & Lory Rosenberg*, Immigration Law and Crime*s §§ 8:9 to 8:21 (section I.E., *supra*).

[357] 8 C.F.R. § 236.1(c)(8).

[358] INA § 236(a), 8 U.S.C. § 1226(a).

[359] 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1); 8 C.F.R. § 1003.19(a).

[360] 8 C.F.R. § 239.1(a).

[361] 8 C.F.R. § 1003.14(a).

may be interested in hearing about the possibility that the respondent is eligible for any relief from removal.[362]

As of this writing, the Immigration Judge in Omaha who primarily serves the detained docket is Judge Morrissey. Most immigration practitioners submit evidence in support of their position in the bond hearing (usually in the form of an affidavit or other documentary evidence). Although he varies the procedure from time to time, Judge Morrissey's usual practice is to ask respondent's counsel (if the respondent is represented) to make an offer of proof regarding what the evidence would be in support of the respondent's request for bond or request for a lower bond. If he deems it appropriate, or if the respondent is not represented, Judge Morrissey will question the respondent and will ask the "usual" questions; i.e., when did the respondent come to the U.S., where does s/he live and with whom, is s/he married, does s/he have children, what is the immigration status of any immediate family members present in the U.S., what criminal record does the respondent have, etc.

A respondent may also ask for a second bond review hearing before an Immigration Judge, but such a request must be in writing and will be granted only if the respondent shows that his or her circumstances have materially changed since the first bond review hearing.[363]

Either side has a right to appeal the Immigration Judge's bond determination. If the bond is reduced by the Immigration Judge and ICE decides to appeal, the regulations provide for an automatic stay of the bond reduction decision if the original bond was set at $10,000 or more.[364]

In 2018, the Supreme Court held, in *Jennings v. Rodriguez*,[365] that those who are being detained under INA § 236(c)[366] are not entitled to bond

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[362] There is currently an interesting issue percolating through the courts about who carries the burden of proof in bond hearings. Must respondents show that they are good candidates for bond, or must the government show that they are not? The BIA has held that the burden of proof is on respondents. *See Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006). But at least one court has held, in a class action suit, that placing the burden of proof on respondents violates due process and the Administrative Procedure Act. *Brito v. Barr*, 415 F.Supp.3d 258 (D. Mass. 2019). As of this writing, the case is on appeal to the First Circuit.

[363] 8 C.F.R. § 1003.19(e).

[364] 8 C.F.R. § 1003.19(i)(2).

[365] 138 S.Ct. 830.

[366] 8 U.S.C. § 1226(c).

hearings or to a presumptive limit on the length of their detention.[367] The Court held that, unlike the statutory language in INA § 241[368] it considered in its 2001 *Zadvydas* opinion (discussed in the next section), the statutory language in § 236(c) is not ambiguous, and therefore it would be inappropriate to use the principle of constitutional avoidance to either limit the amount of time a person can be held in detention or to require a bond hearing, when the unambiguous statutory language does not address either of these things.[369]

b. Detention After Entry of Removal Order.

In 2001, the U.S. Supreme Court held that there are limits to how long the government can detain non-citizens against whom final orders of removal have been entered.[370] Specifically, *Zadvydas* held that those against whom final removal orders have been entered can only be detained for six months. After that, such individuals must be released unless it is reasonably foreseeable that they can be removed to another country.

This issue arises in cases where individuals are citizens of countries who traditionally do not repatriate their citizens at the request of the U.S. government. Although *Zadvydas* only applied to one who had been formally admitted to the U.S., in 2005 the Supreme Court extended its ruling in *Zadvydas* to those who are inadmissible under § 212[371] of the INA.[372]

In response to the *Zadvydas* decision, the Attorney General promulgated regulations implementing the decision and laying out the procedures that must be followed when respondents against whom final orders of removal have been entered request release from custody.[373] Those against whom

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[367] Section 235(b) proceedings.

[368] 8 U.S.C. § 1231.

[369] *Jennings, supra.*, 183 S. Ct. at 842. The Court also held that those being held under 8 U.S.C. § 1225(b)(1) and (2) (those applicants for admission who either assert asylum claims or believe they are entitled to enter for some other reason) likewise can be held without a time limitation and are not entitled to bond hearings.

[370] *Zadvydas v. Davis*, 533 U.S. 678 (2001).

[371] 8 U.S.C. § 1182.

[372] *See Clark v. Martinez*, 543 U.S. 371 (2005).

[373] 8 C.F.R. §§ 241.13 - 241.14.

final removal orders have been entered who are released under post-*Zadvydas* procedures do not have any immigration status in the U.S., but they are eligible to receive employment authorization.[374] Of course, if such individual's removal becomes practicable, he or she will be required to report for removal.

V. POSSIBLE IMMIGRATION CONSEQUENCES OF CRIMINAL PROCEEDINGS.

A. Overview.

This part of the Guide sets forth, in some detail, various categories of immigration consequences that may attach to criminal proceedings. It begins with an overview of some general considerations and also describes some immigration concepts with which state criminal law practitioners need to be familiar. Following that, it reviews various grounds of inadmissibility and deportability that presently exist under the Immigration and Nationality Act and ancillary case law as a consequence of criminal proceedings. It ends with a discussion of "critical categories" in a criminal law/immigration context; that is, those various points along the spectrum of immigration law at which immigration consequences for non-citizens become more severe.

As mentioned at the beginning of the Guide and at the beginning of the statutory analysis charts, it would border on malpractice to simply consult the statutory analysis charts without reading this Guide first, and in conjunction with using the charts. That is because, while the charts identify some of the immigration consequences for non-citizen criminal defendants, there are nuances that turn on the exact immigration status of any particular client. Immigration consequences for a DACA recipient are very different than those for permanent residents. Recipients of Temporary Protected Status need to worry about different factors than those who have been granted asylum. And so forth. The bottom line is to be careful when using the criminal analysis charts, and to make certain you know the precise immigration status of your client before engaging in your own independent analysis of the immigration consequences your client is facing.

B. General Considerations.

1. Legal Hierarchy.

When reading cases that interpret provisions of immigration law, it is important to understand the legal hierarchy of case law precedent and how it affects an individual client's immigration case.

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[374] 8 C.F.R. § 274a.12(c)(18).

Generally speaking, in the context of removal proceedings taking place in the interior of the country, and not at the border or at a port of entry, the hierarchy is as follows:

(1) A local immigration officer, usually one working for ICE, writes up a Notice to Appear (NTA) placing the client into removal proceedings.

(2) Once the NTA is filed with the Immigration Court and proceedings commence before an Immigration Judge, any decision issued by an Immigration Judge in that particular client's case is binding on the local officer.

(3) Either the respondent or DHS may, in most cases, file an appeal of a decision by an Immigration Judge to the Bureau of Immigration Appeals (BIA). A "non-precedent" decision issued by the BIA is the binding law of the case; in other words, the BIA decision binds each entity below it in the hierarchy (i.e., the local officer and the Immigration Judge) with respect to the case in question.

(4) If, in connection with an appeal to the BIA from a decision by an Immigration Judge, the BIA issues a "precedent" opinion (the BIA decides which opinions to designate as precedent opinions), such an opinion is binding on all Immigration Judges and Service officers nation-wide, except for those in a circuit in which contrary circuit court authority exists. Such a decision represents controlling agency authority on the question(s) addressed in the opinion.

(5) Under certain circumstances, a case may be "certified" to the Attorney General in order that an opinion be issued relating to the issues that were litigated before the BIA. Any such opinion issued by the Attorney General is binding in the case in question and, in general, establishes agency policy on the issue(s) discussed.

(6) Some, but not all, agency decisions can be appealed to the appropriate court of appeals. Circuit court opinions are binding on the BIA and DHS for the circuit in which the opinion is issued. For example, in cases decided by Immigration Judges involving clients residing in Nebraska, any Eighth Circuit opinions on point control in any contrary BIA authority or decisions by the Attorney General in "certified" cases.[375]

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[375] The focus is on circuit courts rather than federal district courts because district courts are not normally part of the direct appeals process in removal proceedings. *See* INA § 242(b)(2), 8 U.S.C. § 1252(b)(2), requiring that appeals of final administrative decisions be filed with the court of appeals for the judicial circuit in which the Immigration Judge completed the proceedings. Since many Immigration Courts now conduct hearings via televideo conference, the Immigration Judge is frequently located in one city and the respondent and counsel are located in another city. For venue purposes, the hearing is deemed by EOIR to be taking place at the location where the case is docketed for hearing. *See* Operating Policies and Procedures Memorandum for the Office of the Chief Immigration Judge (OPPM) 04-06

(7) Of course, any United States Supreme Court opinions are the final word on the issues addressed in the opinion.

2. Inadmissibility vs. Deportability.

The legal concepts of inadmissibility and deportability are important to understand when considering possible immigration consequences your clients may face as the result of criminal proceedings. Although there is considerable overlap between the grounds for inadmissibility and deportability, the legal tests are not identical. Additionally, many clients should be concerned with both the grounds of inadmissibility and deportability, as will be further discussed below. Finally, the acts which trigger immigration consequences differ between grounds of inadmissibility and deportability, and practitioners and clients should be aware of those differences in order to make informed decisions when formulating defense strategy.

a. Inadmissibility.

Before the enactment of IIRIRA in 1996, the term "inadmissibility" did not exist. Rather, the focus was on whether someone was "excludable" from the United States.

The issue of excludability arose at the point in time at which an individual was standing at the U.S. border, either literally or figuratively,[376] and sought to enter the country. If such an individual was deemed to be excludable under one or more of the provisions of former § 212(a) of the INA, then the person would be barred from entering the U.S. However, once a person effected an actual physical entry into the U.S. (other than by being paroled into the U.S. or being granted some other official permission to enter that did not constitute a formal entry), he or she was no longer subject to grounds of exclusion, but then became subject to any applicable grounds of deportation, which were located in another section of the INA.

IIRIRA changed all that. The concept of "excludability" was replaced with the concept of "inadmissibility." Now, mere physical presence in

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https://www.justice.gov/sites/default/files/eoir/legacy/2004/08/25/04-06.pdf (last visited October 14, 2020). IIRIRA purported to eliminate review by courts of appeal in many types of removal cases. S*ee* INA § 242(a)(2), 8 U.S.C. § 1252(a)(2)).

[376] Under the pre-IIRIRA concept of exclusion, for example, a person who had been paroled into the U.S. had not effected a legal entry. Thus, even though such a person might be physically present in the U.S., his or her immigration inspection was deferred until a future date at which time she or he was still subject to be "excluded" just as though he or she was physically standing at a port of entry.

the U.S. does not mean that a person has effected an entry. Rather, anyone who has not been "admitted" or who has not gained "admission" into the U.S. is subject to being removed from the U.S. under the grounds of inadmissibility set forth in INA § 212(a).[377] And an individual has not been "admitted" unless she or he has **lawfully** entered the U.S. **after inspection and authorization by an immigration officer**.[378] Similarly, those who have been paroled into the U.S. or permitted to land temporarily as alien crewmen have not been "admitted."[379] Even legal permanent residents (LPRs) who go abroad only briefly may be subject to grounds of inadmissibility under certain circumstances.[380]

What this definition of "admission" means, among other things, is that those who came into the U.S. without being inspected and authorized to enter by an immigration officer are subject to being removed from the U.S. on the basis of one or more grounds listed in § 212(a) of the INA, rather than on the basis of grounds of deportability in § 237(a) of the INA. Thus, any non-citizen involved in criminal proceedings who came into the U.S. without inspection and authorization and who is physically present in the U.S. without documents will face the possibility of being removed from the U.S. because of one or more of the grounds appearing in § 212(a)(2) of the INA. In such cases, it is that statute, and not § 237(a) of the INA, with which you and your client must be concerned.

b. Deportability.

The grounds of deportability are set forth in § 237(a) of the INA.[381] As the introductory language to § 237(a) makes clear, the grounds of deportability apply to those "in and admitted to" the United States. Thus, in order to be subject to one or more of the grounds of deportability in § 237(a), one must have been "admitted" to the U.S., as that term is defined in § 101(a)(13) of the INA.[382]

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377 8 U.S.C. § 1182(a).

378 INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A).

379 INA § 101(a)(13)(B), 8 U.S.C. § 1101(a)(13)(B).

380 INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C).

381 8 U.S.C. § 1227(a).

382 8 U.S.C. § 1101(a)(13).

The grounds of deportability dealing with criminal offenses appear at § 237(a)(2) of the INA.

c. Being Concerned About Both Inadmissibility and Deportability.

Given the foregoing discussion, the issues seem to be relatively simple: those involved in criminal proceedings who are present in the U.S. because they have been admitted with inspection and have some valid immigration status need to worry about grounds of deportability in § 237(a)(2), while those who did not enter with inspection and who are present without immigration status must worry about the grounds of inadmissibility under § 212(a) – right? Wrong. Unfortunately, the world of immigration law is not that simple. Because IIRIRA re-vamped the definition of "admission," even clients who are permanent residents may be affected by criminal grounds of inadmissibility under § 212(a)(2).

As an illustration of this point, consider the improbable case of Jesus Collado-Munoz.[383] Mr. Collado-Munoz, a native of the Dominican Republic, became a permanent resident of the United States in 1973. In July, 1974, he was convicted of the crime of sexual abuse of a minor, as the result of engaging in consensual sexual intercourse with his then-girlfriend, who was under the age of majority. As a result, Mr. Collado was sentenced to three years' probation. Shortly before the effective date of IIRIRA (April 1, 1997), Mr. Collado left the U.S. to visit the Dominican Republic, his native country, for two weeks. When he attempted to re-enter the U.S., using his Permanent Resident Card, on April 7, 1997, he was refused admission due to his 1974 conviction, which the legacy INS contended rendered him inadmissible under the post-IIRIRA version of § 212(a)(2) of the INA.[384] Mr. Collado argued that the *Fleuti* doctrine[385] held that, because he was a permanent resident, he was not seeking "admission" to the U.S., and therefore he was not subject to the grounds of inadmissibility under § 212(a)(2). The legacy INS argued

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[383] *In re Collado*, 21 I&N Dec. 1061 (BIA 1998).

[384] 8 U.S.C. § 1182(a)(2).

[385] *See Rosenberg v. Fleuti*, 374 U.S. 449 (1963). Briefly, *Fleuti* held that a short-term departure from the U.S. by a non-citizen who is a lawful permanent resident constitutes a "brief, innocent and casual" departure and, as a result, such a person is not subject to any statutory grounds of exclusion upon return to the U.S. because the person is deemed not to have broken his physical presence in the U.S. by a "brief, innocent and casual" departure.

that the change made by IIRIRA, which defined "admission" as set forth in § 101(a)(13) of the INA,[386] repealed the *Fleuti* doctrine.

The BIA agreed with the legacy INS' argument and held that the plain language of § 101(a)(13) now defines when an individual is seeking admission, and that the *Fleuti* case, which interpreted a prior version of the statute, was no longer applicable to a situation like that of Mr. Collado. As a result, the BIA held that Mr. Collado was subject to the grounds of inadmissibility under § 212(a)(2) despite the fact that the crime of which he had been convicted was over 24 years old.

This remained the law until 2012, at which time the United States Supreme Court decided *Vartelas v. Holder*.[387] Like Mr. Collado-Munoz, Mr. Vartelas was a long-time LPR: he gained his permanent resident status in 1989. In 1994, he pled guilty to conspiring to make a counterfeit security (a felony) and served a four-month jail term as the result of his conviction. He traveled to Greece to visit his parents in 2003, and tried to return to the U.S. one week later. However, Customs and Border Protection considered him to be a non-citizen seeking admission to the U.S., under the *Collado-Munoz* rationale, and he was placed in removal proceedings based on the fact that his 1994 conviction made him inadmissible. The Supreme Court held that the definition of "admissibility" in INA § 101(a)(13)[388] does not apply retroactively, contrary to what the BIA held in *Collado-Munoz*, and that Mr. Vartelas was therefore not someone seeking admission, and could use the *Fleuti* doctrine to come back in to the United States as a returning LPR. So any LPR who leaves the U.S. and seeks to come back, so long as his or her departure was "innocent, casual and brief,"[389] does not have to worry

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[386] 8 U.S.C. § 1101(a)(13).

[387] 566 U.S. 257 (2012).

[388] 8 U.S.C. § 1101(a)(13).

[389] It is important to note that *Vartelas* did not hold that a non-citizen with a pre-April 1, 1997, conviction is never deemed to be seeking admission upon returning to the U.S. It only held that those who are LPRs and whose departures satisfy the *Fleuti* doctrine are not deemed to be seeking admission. Since *Collado-Munoz* was decided in 1998, most of us have forgotten how to determine if a departure is "innocent, casual and brief." We will now have to re-learn what that phrase means, at least for pre-IIRIRA convictions. The two cases – *Fleuti* and *Vartelas* – give us some guidance. In *Fleuti*, the non-citizen went to Tijuana, Mexico for a few hours, and then returned to the U.S. In *Vartelas*, the non-citizen went to visit his parents for about a week. Both of those were "innocent, casual and brief" departures. Because this legal test involves assessing the totality of the circumstances, it is difficult to draw any bright lines, but we would be very nervous about LPR clients staying away for more than six months, regardless of the ties they retain to the U.S. in their absence, and regardless of the expressed purpose of

about a pre-April 1, 1997, conviction subjecting him or her to the grounds of inadmissibility. But LPRs who have convictions of April 1, 1997, or later still have to worry about the *Collado-Munoz* trap. The holding in *Vartelas* only applies to convictions that pre-date IIRIRA's effective date.

As the *Collado* and *Vartelas* cases show, even clients who are permanent residents may need to be concerned with grounds of inadmissibility, and not just with grounds of deportability, at least with respect to convictions of April 1, 1997, or later. Even someone who is a permanent resident will be subject to the grounds of inadmissibility under § 212(a)(2) of the INA once he leaves the U.S. and attempts to re-enter the country **if** he is convicted of a crime that falls under § 212(a)(2) of the INA.[390] Such a person, unless she or he has been granted a waiver of inadmissibility pursuant to § 212(h) of the INA[391] or § 240A(a) of the INA,[392] will not be able to return to the U.S. after a trip abroad.[393]

d. Interaction of Federal and State Law.

Interestingly, the only mention of immigration in the U.S. Constitution relates to Congress' authority to establish a uniform rule of naturalization.[394] But the U.S. Supreme Court has repeatedly held that the authority to either admit individuals to the U.S. or exclude them from the U.S. is a fundamental act of sovereignty reserved to the United States

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their trips. Of course, since the test is phrased in the conjunctive, even a short trip may be something other than "innocent" or "casual," and therefore make *Fleuti* inapplicable. As the Court pointed out in *Fleuti*, courts are capable of deciding this issue on a case-by-case basis. *Fleuti*, 374 U.S. at 462. At least for pre-April 1, 1997, convictions, we will be back to that case-by-case world.

[390] *See* INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C).

[391] 8 U.S.C. § 1182(h).

[392] 8 U.S.C. § 1229b(a).

[393] The BIA has held that it is the government's burden of proof to show that a returning LPR is an applicant for admission. In other words, the government must prove, by clear and convincing evidence, that one of the six exceptions of INA § 101(a)(13)(C) (8 U.S.C. § 1101(a)(13)(C)) applies to a returning LPR. And the BIA has held that an LPR "engages in illegal activity after having departed the United States" by trying to smuggle someone into the U.S. at a port of entry as the LPR is attempting to enter the U.S. Such an LPR is deemed to be seeking admission under § 101(a)(13)(C)(iii), and therefore is subject to the grounds of inadmissibility. *Matter of Guzman Martinez*, 25 I&N Dec. 845 (BIA 2012).

[394] U.S. Const. Art. I, § 8, cl. 4.

federal government as a sovereign nation.[395] Therefore, the statutory and regulatory scheme governing immigration is found at the federal level.

When it comes to the issue of whether a person is inadmissible or deportable because of state criminal proceedings, however, things become a bit more nuanced. Of course, federal law applies to determine if the person is either inadmissible or deportable, but in applying federal law, the immigration decision-maker has to look to the state offense to determine if its elements meet the federal definition at issue.

For example, suppose that ICE charges a lawful permanent resident with being deportable due to his conviction, under Neb. Rev. Stat. § 28-310, of assault in the third degree. ICE alleges that such a conviction is for a "crime involving moral turpitude" which the client committed within five years of his last entry into the U.S. and that the maximum possible sentence was a year, since the assault was not the result of a fight or scuffle entered into by mutual consent.

An Immigration Judge considering this case will need to apply a federal definition -- "crime involving moral turpitude" –- to determine if the client is deportable as ICE has charged. However, in making his or her determination, the Immigration Judge will have to consider the elements of the offense described in the Nebraska statute to determine if those elements of the state crime meet the federal definition of "crime involving moral turpitude." Thus, federal definitions of inadmissibility and deportability must be applied to the elements of state crimes. As a result, decision-makers in immigration cases involving state criminal convictions analyze both federal and state law.

C. Grounds of Inadmissibility.

1. Overview.

Section 212(a) of the INA[396] contains the classes of those who are ineligible to be admitted to the United States. Said another way, § 212(a) contains the grounds of inadmissibility. There are several grounds under which a person may be found to be inadmissible. However, this Guide will focus only on those grounds of inadmissibility that result from criminal convictions or criminal conduct. Most of the grounds of inadmissibility relating to criminal convictions are found in § 212(a)(2) of the INA.

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[395] *See, e.g., United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *Arizona v. United States*, 567 U.S. 387 (2012).

[396] 8 U.S.C. § 1182(a).

2. Health-Related Grounds of Inadmissibility: Alcohol and Drug-Related Offenses.

The INA provides that one who seeks admission to the U.S. and who is determined (1) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the applicant for admission or others, (2) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the admission applicant or others and which behavior is likely to recur or to lead to other harmful behavior, or (3) who is determined to be a drug abuser or addict, is inadmissible to the U.S.[397]

Although these grounds of inadmissibility are not, strictly-speaking, criminal grounds of inadmissibility, they are often implicated by criminal behavior induced or accompanied by alcohol or drug dependance. Because of that, criminal defense counsel needs to be aware that alcohol-related or drug-related offenses have the potential to make a client inadmissible not because of the crime itself, but because the crime may, in the eyes of immigration decision-makers, represent the manifestation of an alcohol or drug abuse problem.

Just to underscore the point that alcohol-related offenses are not criminal grounds of inadmissibility, consider that the BIA has held that the offense of driving under the influence is **not** a crime involving moral turpitude.[398] This is true even if the DUI conviction is at the felony level due to multiple prior DUI convictions.[399] The rationale for this holding is that the existence of a certain level of blood alcohol content is not, in and of itself, a morally turpitudinous act: it is more in the nature of a regulatory offense.[400]

Often, clients who are currently in the U.S. without documents, and who wish to obtain documents, must leave the U.S. and go through consular processing in their home countries in order to re-enter the U.S. with inspection. Their applications for entry visas are adjudicated by consular officers of the Department of State.

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[397] INA § 212(a)(1)(A)(iii)(I) and (II), § 212(a)(1)(A)(iv); 8 U.S.C. § 1182(a)(1)(A)(iii)(I) and (II), § 1182(a)(1)(A)(iv).

[398] *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001).

[399] *Id*.

[400] However, the BIA has held that if a person drives under the influence knowing that his driver's license has been suspended in violation of Arizona law, he is engaged in culpable conduct and has been convicted of a crime involving moral turpitude. *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999). The *Lopez-Meza* case involved both drunk driving and driving under suspension.

One of the tools guiding consular officers' adjudications is the Foreign Affairs Manual (FAM).[401]

The FAM states that, while alcoholism is not specifically referred to in the statute as a health-related disorder, alcoholism is a medical disorder.[402] Consular officers are directed to refer a visa applicant to a "panel physician" (i.e., one whom the State Department has authorized to do medical examinations) in three circumstances:

> (1) they have a single alcohol-related offense or conviction within the last five years;
>
> (2) they have two or more alcohol-related arrests or convictions within the last 10 years; or
>
> (3) there is any other evidence to suggest an alcohol problem.[403]

Despite the language of both the FAM and the cable, it is our experience that if a visa applicant falls into any of the categories set above, the consular officer will simply find that he or she is inadmissible. The FAM gives DHS the authority to grant a waiver of this ground of inadmissibility, but it is highly discretionary.[404] If no waiver is granted, the final determination cannot be appealed. Under such circumstances, the only recourse is to file another visa application and seek a different determination, or simply wait until the appropriate time passes and then re-apply for a visa.[405] Often, the second option is the only realistic one. Obviously, this can work a severe hardship on clients, who may have to wait outside the U.S. for an extended period of time.

The Department of Homeland Security has a similar requirement for applicants with whom it is dealing in the U.S., such as applicants for adjustment of status.[406]

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[401] U.S. Dep't of State, *Foreign Affairs Manual (FAM)*, https://fam.state.gov/ (last visited June 17, 2021).

[402] 9 FAM 302.2-7(B)(3), paragraph a.

[403] *Id*. at paragraph b.

[404] 9 FAM 302.2-7(D).

[405] The appropriate time that must pass for a visa applicant to show remission presumptively is one year. 9 FAM 302.2-7(B)(2), paragraph b. But the FAM makes clear that, even after one year, a finding of remission is not guaranteed. *Id*.

[406] *See* Danielle L.C. Beach, '*Twas the Season to be Jolly: the Immigration Consequences of Excessive Libations*, 87 No. 17 Interpreter Releases 873, 877 (2010), discussing a January 16, 2004, memorandum issued by W. Yates entitled "Requesting Medical Re-

As a practical matter, it is easier to make certain that formal procedures are followed in the adjustment of status context, because applicants are physically present in the U.S., where immigration counsel has more of an opportunity to advocate effectively for them.

So-called "DUI-drug" cases (driving under the influence of a controlled substance) could also implicate this particular ground of inadmissibility. In fact, any offense that has an alcohol or drug overlay to it (domestic assault, driving, etc.) has the potential to trigger this health-related ground of inadmissibility.

Certain types of immigration clients are, in fact, subject to losing their status based on a single DUI conviction. For example, a client who has received Deferred Action for Childhood Arrivals (DACA) status will lose that status if the client is convicted of a single DUI offense. Such an offense is considered to be at least a "significant misdemeanor" which will cause DACA status to be revoked.[407]

Finally, in 2016, the State Department adopted a policy whereby it declared it has the authority to "prudentially" revoke the non-immigrant visa of any non-citizen who has been arrested for a DUI offense.[408] This is obviously a grave concern for any client who is a non-immigrant –- a visitor, a student, a temporary worker, etc. Revocation of such a client's visa makes the client immediately removable from the U.S. If the client has left the U.S. and is seeking to re-enter the country (for example, a foreign student who has traveled home during a break), that client will be denied admission.

In short, if your client is charged with any type of offense that involves drugs or alcohol, both you and your client need to understand the possible inadmissibility ramifications, and take any steps realistically possible to ameliorate those ramifications.

3. Crimes Involving Moral Turpitude.

a. Definition.

Any non-citizen who (1) is convicted of a "crime involving moral

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Examinations: Alien Involved in Significant Alcohol-Related Driving Incidents and Similar Scenarios."

[407] *See* the National Security and Public Safety Guidelines section of the DACA page on the USCIS website: https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca (last visited June 17, 2021).

[408] 9 FAM 403.11-5(B)(U)c. https://fam.state.gov/FAM/09FAM/09FAM040311.html (last visited October 14, 2020).

turpitude," (2) admits having committed a crime of moral turpitude, or (3) admits committing acts that constitute the essential elements of a crime involving moral turpitude is inadmissible.[409] Convictions for attempts to commit such crimes or conspiracies to commit such crimes also render a person inadmissible.[410]

The definition of "moral turpitude" is not found in the INA. Because "moral turpitude" is not defined in the statute, courts have had to supply the working definition of this term. The most common definition one encounters defines a "crime involving moral turpitude," in general, as a crime that is "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general."[411] Such a crime has been defined as an act *per se* morally reprehensible and intrinsically wrong, or *malum in se*, as opposed to *malum prohibitum*, so it is the nature of the act itself and not the statutory prohibition of it that constitutes an act of moral turpitude.[412]

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[409] INA § 212(a)(2)(A)(ii), 8 U.S.C. § 1182(a)(2)(A)(i).

[410] *Id*. Note that categories (2) and (3) do not require a conviction – they simply require that the person admits either committing a crime or admits to committing acts which an officer concludes constitutes the essential elements of a crime that renders the person inadmissible. Thus, even those who have not been convicted of crimes may be inadmissible, depending on what admissions they make and under what circumstances those admissions are made. For a further discussion of the intricacies of this point, *see* Kesselbrenner & Rosenberg, *Immigration Law and Crimes*, § § 3:2 - 3:6 (2020). For a further definition of "conviction," see Section V.D.2 of this Guide, *infra*.

[411] *See, e.g., Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994), *aff'd*, 72 F.3d 571 (8th Cir. 1995).

[412] *Id*. So, is this phrase constitutionally suspect because it is too vague? The Supreme Court, in 1951, said no. *Jordan v. De George*, 341 U.S. 223 (1951). However, given the Court's holding in *Dimaya* that 8 U.S.C. § 16(b) is unconstitutionally vague (*see* discussion in section V.D.6.e.(6), *infra*.), there may be some doubt about the continued validity of that holding. There is currently litigation around the country challenging the constitutionality of this statute, on the grounds that it is unconstitutionally vague. *See, e.g., Romero v. Sessions*, 736 F. App'x 632 (9th Cir. 2018) (declining to address the issue but finding the vagueness argument "compelling"); *Marmolejo-Campos v. Holder*, 558 F.3d 903, 909 (9th Cir. 2009) (en banc) (noting that " 'moral turpitude' is perhaps the quintessential example of an ambiguous phrase"); *Arias v. Lynch*, 834 F.3d 823, 830, 835 (7th Cir. 2016) (Posner, J., concurring) (noting that the phrase is "stale, antiquated, ... meaningless[,]" "vague[ ], rife with contradiction, a fossil, [and] an embarrassment to a modern legal system"). *But see Guevara–Solorzano v. Sessions*, 891 F.3d 125 (4th Cir. 2018) (rejecting the vagueness argument); *Verdugo-Morales v. Sessions*, 719 F. App'x 507 (6th Cir. 2018) (rejecting the vagueness argument).

b. The Categorical Approach and "Divisible" Statutes.

Although this discussion is offered in the context of analyzing whether a crime is a crime involving moral turpitude, the categorical approach applies any time one analyzes a crime to determine whether it constitutes an inadmissible or deportable offense. Thus, whether a crime is an aggravated felony, or a domestic violence offense, or a firearms offense, or any other type of crime that carries immigration consequences – in all of these inquiries courts use the categorical approach outlined here to determine what type of crime is involved and what immigration consequences it carries.

Determining whether a client has been convicted of a crime involving moral turpitude is more complicated than it might first appear. The focus, courts have repeatedly held, must be on, and only on, determining what crime the client was convicted of, and then deciding whether, based only on the elements of that crime, the crime is one involving moral turpitude. In order to help them make this limited and focused determination, courts have developed what has come to be known as the "categorical approach" with respect to "indivisible" criminal statutes – in other words, those criminal statutes that contain the elements of only one criminal offense. Courts have also developed an approach to help them determine of which crime a client was convicted in cases involving "divisible" criminal statutes – in other words, those statutes that contain elements of more than one criminal offense. Each of these key concepts is discussed briefly below. Following that brief discussion, there is a survey of case law applying these concepts in specific factual and legal settings.

Categorical Approach. When deciding whether a state criminal offense describes a "crime involving moral turpitude," (CIMT)[413], both administrative and Article III courts have followed what has come to be known as the "categorical" and "modified categorical" approaches. And, as stated above, these approaches are also followed in determining whether other types of crimes have immigration consequences.

The categorical approach is used in a number of contexts.[414] As you will see, it has particular significance in the immigration context, and will often be involved when determining whether or not a crime carries immigration consequences. The focus of the categorical approach, as explained below in the case law survey, is on what crime a client has been convicted of, and not what the client actually did in order to be convicted

[413] Or any other type of crime that carries immigration consequences.

[414] For example, this approach is used by courts in cases involving the Armed Career Criminal Act (ACCA), 8 U.S.C. § 924.

of the crime in question. That is important in determining the immigration consequences of a criminal conviction, because immigration decision-makers must assume, absent evidence in the record of conviction to the contrary, that a client engaged in the least culpable conduct necessary to be convicted of any given crime. How this plays out in practice is illustrated by the cases reviewed in the following subsections.

Divisible Statutes. Another concept explored in the cases discussed below is that of divisibility of statutes. Many criminal statutes have various subparts to them, whether those subparts take the form of separate paragraphs, or disjunctive examples, or other grammatical forms. Sometimes such statutes actually define multiple crimes; in immigration parlance, those are called divisible statutes. Other times, they define a single crime, but state alternative means by which that crime can be committed; in immigration parlance, those are indivisible statutes.

Because the focus of the categorical approach is to determine which crime a client was convicted of, the courts have fashioned an approach to help them determine (1) whether a statute is divisible (defines multiple criminal offenses) or indivisible (unitary) and, if the statute is divisible, (2) which portion of a divisible statute, and therefore what particular crime, the client was convicted of. As you read the cases discussed below, you will see how this plays out in practice and why it is an important concept in immigration law.

(1) *Taylor v. United States.*[415]

The categorical approach has its roots in the case of *Taylor v. United States*, which is actually a criminal case, not an immigration case. The issue in *Taylor* was whether a defendant's sentence should be enhanced under the Armed Career Criminal Act.[416] That Act allows sentence enhancements in federal criminal cases where the defendant has previously been convicted of a "violent felony," whether such convictions were of state or federal law. "Violent felony," in turn, is statutorily defined as, *inter alia*, "burglary." The task the *Taylor* Court faced was to determine if the defendant's two prior convictions in Missouri state court for second degree burglary matched the federal definition of "burglary" found in 18 U.S.C. § 924(e).[417] The Court held that, in determining whether any of the defendant's prior convictions were "violent felonies," it was required to look **only** to the elements of

[415] 495 U.S. 575 (1990).

[416] 18 U.S.C. § 924.

[417] Isn't federalism fun?

the state statutes under which the defendant had been convicted, and should not look to the particular facts that led to the convictions.[418] In other words, the analysis focuses on the nature of the crime/conviction itself, and not on the nature of the acts in which the defendant engaged in committing the crimes. That is what makes the analysis "categorical" – courts are tasked with determining if a particular conviction falls within a certain category of criminal offenses. In this case, the Court had to determine whether the defendant's conviction fell in the category of a "burglary," as that term is categorically defined under federal law.

But that presented the Court with another problem – defining what "burglary" is for purposes of federal law. The reason that was a dilemma is because Congress did not include a statutory definition in the ACCA. As the Court pointed out, there is no uniform definition of "burglary" – various state statutes define it in different ways. But the Court held that its task was to determine, for purposes of federal law, what definition of burglary was appropriate to use. It held that, for federal purposes, the term cannot be defined by reference to a particular state statutory definition, since that would result in inconsistent results, depending on which state statute was involved:

> [W]e are led to reject the view of the Court of Appeals in this case. It seems to us to be implausible that Congress intended the meaning of "burglary" for purposes of § 924(e) to depend on the definition adopted by the State of conviction. That would mean that a person convicted of unlawful possession of a firearm would, or would not, receive a sentence enhancement based on exactly the same conduct, depending on whether the State of his prior conviction happened to call that conduct "burglary."[419]

After doing an extensive legislative history review, and an historical case survey for guidance in how to undo this Gordian knot, the Court ultimately held that the best approach would be to adopt the federal "generic" definition of burglary, meaning the definition of that term that roughly corresponds to the way the term was defined by the majority of states' criminal codes at the time

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[418] *Taylor*, 495 U.S. at 600.

[419] *Id*. at 590-591.

the federal legislation was enacted.[420] Using that method, the Court determined that the federal generic definition of "burglary" contains these elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.[421]

All of the cases that follow *Taylor* use this same approach: (1) determine what offense is in play for federal purposes; (2) determine the elements of the generic federal offense; (3) look to the elements of the state offense to determine if there is a match between the state elements and the federal generic elements. The following cases explore how this scheme plays out in various contexts.

(2) *Shepard v. United States*.[422]

The test for determining the category of previous state criminal convictions worked well in *Taylor*, for various reasons. But how does a federal court decide what category of offense of which a defendant has been convicted, and what elements are involved in such an offense, where the state statute penalizes conduct that is more inclusive and sweeps broader than the applicable federal generic offense?

The Supreme Court addressed this issue in *Shepard*. This case again dealt with the Armed Career Criminal Act. But the issue in this case was what documents a court should consult when determining whether a defendant has been convicted of a specified category of crime under an overbroad state statute; i.e., one that sweeps more broadly than the federal generic equivalent statute. Recall that, under *Taylor*, the Court held that the only task in ACCA cases is to determine the type, or category, of offense of which a defendant had previously been convicted. Generally, that is done by looking at only the elements of the statute in question. But if the elements of the state statute under which a defendant is convicted are broader than the equivalent federal generic offense, it cannot serve as the basis for a sentence enhancement in federal court because it does not fall within the category of offense Congress intended federal courts to use to enhance sentences.

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420 *Id*. at 589.

421 *Id*. at 598.

422 544 U.S. 13 (2005).

The defendant in *Shepard* pled guilty to burglary under Massachusetts state statutes. In his federal prosecution for being a felon in possession of a firearm,[423] the government argued that his sentence should be enhanced under the ACCA because of his prior state burglary convictions. Shepard argued that the state burglary statutes under which he was convicted as a result of his guilty pleas did not fit the federal generic definition of "burglary" for purposes of the ACCA, because they criminalized burglary of places other than dwellings, whereas the federal generic crime of burglary, as the Court defined it in *Taylor*, only involved burglary of dwellings. Thus, the defendant argued, the state statutes were "overbroad" in the sense that they involved crimes Congress did not intend to use to enhance the federal crime the defendant had committed.

The government argued that police reports showed that Shepard had, in fact, burglarized dwellings, which fits the federal generic definition of burglary. Shepard argued that police reports should not be considered in determining what crime of which he had been convicted under state law. Because the Court's prior decision in *Taylor* dealt with a jury verdict, the specific rule it created – that a sentencing court should look only to the statutory elements of the state crime, the charging documents, and the jury instructions, did not work, since there was no trial in Shepard's case.

The Supreme Court held that the categorical approach it established in *Taylor* had not resulted in any action by Congress in the 15 years since that decision, and thus showed that Congress acquiesced in its reasoning. That only left the Court to determine what types of documents should be considered to determine the category of an offense in cases where no jury trial takes place. The Court held that only the following types of documents could be considered to determine what category of crime the defendant had been convicted of: the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.[424]

But, as later cases make clear, it is inappropriate to look at any documents to determine what a defendant did – it is only appropriate to look at documents when the task is to determine which portion of a divisible statute the defendant was convicted

[423] 18 U.S.C. §922(g)(1).

[424] 544 U.S. at 26.

under. To stress the point again, the purpose of the categorical approach is to determine what crime a defendant was convicted of – not what he actually did. And that is the issue the Board of Immigration Appeals address in *Matter of Ajami*.

(3) *Matter of Ajami*.[425]

In *Ajami*, the respondent was convicted of the crime of aggravated stalking under a Michigan statute with several paragraphs, some of which required acts of moral turpitude for conviction and some of which did not. As a result, the BIA looked at the record of conviction to determine under which paragraph of the statute the respondent was convicted. After doing so, the BIA decided that the respondent was convicted under a paragraph of the statute that required him to act willfully and, therefore, concluded that moral turpitude was involved.

This is an example of how the "modified categorical approach" is used – to determine the exact offense involved where the state criminal statute is divisible; that is, where it contains more than one freestanding crime.

(4) *Gonzalez v. Duenas-Alvarez*.[426]

In this case, the Supreme Court added an element to the modified categorical approach adopted by the BIA in *Ajami*. The issue in *Duenas-Alvarez* was whether California's theft statute was written broadly enough to include not only traditional "thefts," but also crimes that would not meet the federal generic definition of "theft." More specifically, the state statute in *Duenas-Alvarez* defined "theft" as including being an accessory or accomplice after the fact.

The Ninth Circuit held that the defendant had not been convicted of a "theft" offense because the least culpable conduct required for a conviction theoretically would not have to involve "theft." In *Duenas-Alvarez*, the Supreme Court added an element to the modified categorical analysis –the "realistic probability" test. Under that test, Mr. Duenas-Alvarez was required to show that there was a realistic probability that one could be convicted under the California statute for engaging in non-theft conduct. And how was Mr. Duenas-Alvarez to meet this new burden of proof

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425 22 I&N Dec. 949 (BIA 1999).

426 549 U.S. 183 (2007).

imposed on him? By providing the decision-maker with an actual case (which could include his own case) in which the defendant was prosecuted under the statute for engaging in "non-theft" conduct. In other words, unless Mr. Duenas-Alvarez could come forward with an actual case in which a defendant was prosecuted for non-theft conduct, the immigration decision-maker should not assume that such conduct is realistically prosecuted, and therefore should not assume it is the least culpable conduct required for conviction under the statute.[427]

(5) *Matter of Silva-Trevino*.[428]

Former Attorney General Mukasey threw a bit of a wrench into the categorical/modified categorical analysis when he issued the *Silva-Trevino* decision in 2008. This decision articulated circumstances under which the Attorney General believed it would be appropriate to take a fact-specific approach to determining whether a defendant has been convicted of a crime involving moral turpitude. However, former Attorney General Eric Holder vacated this opinion in 2015, so it is no longer binding authority.[429]

(6) *Nijhawan v. Holder.*[430]

In *Nijhawan*, a unanimous Supreme Court held that some statutes call for a "circumstance-specific" approach, rather than a categorical approach. In this case, the defendant was convicted, after a jury trial, of mail fraud, wire fraud, bank fraud, and money laundering. Although the jury made no specific finding as to the dollar amount of loss the victim had suffered, at the sentencing phase of the case, the defendant stipulated that there had been a

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[427] Several courts, including the Eighth Circuit, have held that the "realistic probability" requirement does not apply where the statute in question specifically criminalizes particular conduct. In *Gonzalez v. Wilkinson*, 990 F.3d 654 (8th Cir. 2021), the Eighth Circuit held that a non-citizen was not required to show that there was a realistic probability that Florida actually prosecuted people for the conduct that made the offense of possession of cannabis broader than the generic federal offense, because the Florida statute expressly criminalized such conduct. In such cases, there is no need for the client to show that such conduct would actually be prosecuted.

[428] 24 I&N Dec. 687 (AG 2008).

[429] *Matter of Silva-Trevino*, 26 I&N Dec. 550 (AG 2015).

[430] 557 U.S. 29 (2009).

monetary loss in excess of $100 million, and the court ordered restitution in the amount of $683 million.

The government sought to deport the non-citizen defendant, arguing that he had been convicted of an aggravated felony; specifically, that he had been convicted of an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000.[431] The defendant argued that the Immigration Court should use the categorical approach articulated in *Taylor* in determining whether he was convicted of an aggravated felony, and that since the $10,000 limit was not an element of the criminal offense of which he was convicted, it did not fit the definition of an aggravated felony. Alternatively, the defendant argued that the Immigration Court should use the modified categorical approach and only consult the documents specified in *Shepard*.

The Supreme Court held that the portion of the aggravated felony statute specifying the dollar amount of the loss was a non-elemental fact; that is, a fact that it is not necessary for the government to prove beyond a reasonable doubt in order to convict a defendant of the crime in question. As a result, it was appropriate to look at the specific circumstances under which the crime was committed:

> Subparagraph (M)(i) [of 8 U.S.C. § 1101(a)(43)] refers to "an offense that ... involves fraud or deceit in which the loss to the victim or victims exceeds $10,000" (emphasis added). The language of the provision is consistent with a circumstance-specific approach. The words "in which" (which modify "offense") can refer to the conduct involved "in" the commission of the offense of conviction, rather than to the elements of the offense. Moreover, subparagraph (M)(i) appears just prior to subparagraph (M)(ii), the internal revenue provision we have just discussed, and it is identical in structure to that provision. Where, as here, Congress uses similar statutory language and similar statutory structure in two adjoining provisions, it normally intends similar interpretations.[432]

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[431] INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i).

[432] *Nijhawan*, 557 U.S. at 38-39.

The Court also rejected the defendant's argument that decision-makers must limit the universe of documents they consider to determine if the specific circumstances were met (i.e., the monetary amount of the loss) to those articulated in *Shepard*. The Court found nothing either unworkable or unfair in allowing decision-makers to consider, in cases like this, the stipulation as to the dollar amount of the loss offered by the defendant at the sentencing hearing.[433]

(7) *Moncrieffe v. Holder.*[434]

The 2012-2013 Supreme Court term produced two major decisions regarding the categorical approach to interpreting statutes carrying immigration consequences as the result of criminal proceedings. The first of those cases is *Moncrieffe*.

The defendant in *Moncrieffe* was involved in a traffic stop where the police found him in possession of 1.3 grams of marijuana. He pled guilty to a Georgia state offense of possession with intent to distribute. Under a Georgia statutory provision, adjudication of guilt was withheld and Moncrieffe was sentenced to five years of probation, after which time the charge was to be expunged.[435]

DHS sought to deport Moncrieffe, who was not a citizen, on the basis that he had been convicted of an aggravated felony – specifically, a drug trafficking offense as defined in INA § 101(a)(43)(B).[436] The Immigration Court, the BIA, and the Fifth Circuit Court of Appeals all held that Moncrieffe had been convicted of an aggravated felony, even though the Georgia statute under which he was convicted punished the offense as a

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[433] *Id*. at 42-43. The BIA has adopted the circumstance-specific approach in cases involving the ground of deportability related to a conviction for a crime of domestic violence. *Matter of H. Estrada*, 26 I&N Dec. 749 (BIA 2016). In that case, the BIA held that the circumstance-specific approach is appropriate to determine whether a respondent convicted of assault committed the crime against his domestic partner. The BIA found the statute, 8 U.S.C. § 1227(a)(2)(E)(i), to be more like the statute in *Nijhawan* than like statutes that call for a strict categorical approach. Additionally, the BIA held that any reliable evidence, including police reports, could be consulted to determine the status of the victim against whom a "crime of domestic violence" has been committed.

[434] 569 U.S. 184, (2013).

[435] *Id*. at 188-189.

[436] 8 U.S.C. § 1101(a)(43)(B).

misdemeanor, because possession with intent to distribute constitutes "illicit trafficking in a controlled substance," as prohibited by the aggravated felony statute.

Using the categorical approach, the Supreme Court held that Moncrieffe's Georgia conviction did not meet the two conditions it must meet in order to qualify as an aggravated felony: (1) the conduct involved (here, marijuana trafficking) must be prohibited by the Controlled Substance Act (CSA) and (2) the CSA must prescribe felony punishment for that conduct.[437] The second requirement comes from the reference in the aggravated felony statute that a "drug trafficking crime" is one that is defined in 18 U.S.C. § 924(c). But that statute includes a provision that punishes one type of action at the misdemeanor level, not the felony level: a case involving distribution of a small amount of marijuana for no remuneration.[438]

The Supreme Court held that it was required to use the categorical approach as set forth by *Taylor* and its progeny to determine of what crime Moncrieffe was convicted. And using that approach, it was foreclosed from asking what Mr. Moncrieffe actually did, which in this case meant it could not tell what amount of marijuana was involved, nor whether Moncrieffe received remuneration for distributing the marijuana. So it had to assume that he was convicted for the least culpable conduct that would sustain a conviction under the state statute.

Tipping its hat to the *Duenas-Alvarez* requirement that there must be a realistic probability that Moncrieffe could have been prosecuted for such least culpable conduct (i.e., possession with intent to distribute when only a small amount of marijuana), the Court held that he could have been so prosecuted, since Georgia appellate court opinions reflected such convictions when as little as 6.6 grams of marijuana were involved.[439] Taking all of these facts and precedents into consideration, the Supreme Court held that Moncrieffe was not deportable as an aggravated felon:

> Ambiguity on this point [whether remuneration was involved] means that the conviction did not "necessarily" involve facts that correspond to an

[437] *Moncrieffe*, 569 U.S. at 192.

[438] 21 U.S.C. § 821(b)(4).

[439] *Moncrieffe*, 569 U.S. at 194.

> offense punishable as a felony under the CSA. Under the categorical approach, then, Moncrieffe was not convicted of an aggravated felony.[440]

The Court rejected the government's argument that this case called for a circumstance-specific approach like the one it adopted in *Nijhawan*:

> The monetary threshold [in 8 U.S.C. § 1101(a)(43)(M)(I)] is a limitation, written in to the INA itself, on the scope of the aggravated felony for fraud. And the monetary threshold is set off by the words "in which," which calls for a circumstance-specific examination of "the conduct involved '*in*' the commission of the offense of conviction. Locating this exception in the INA proper suggests an intent to have the relevant facts found in immigration proceedings. But where, as here, the INA incorporates other criminal statutes wholesale, we have held it "must refer to generic crimes," to which the categorical approach applies.[441]

Thus, *Moncrieffe* reinforced the Supreme Court's command that a categorical approach is to be used when determining of what crime a person has been convicted.

(8) *Descamps v. United States*.[442]

Descamps can be thought of as the poster child case for defining how the categorical approach is to be applied. It is worth a careful read.

This is another Armed Career Criminal Act (ACCA) case, although it certainly has applicability in the immigration context.[443] Mr. Descamps was convicted of being a felon in

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[440] *Id*. at 194-195.

[441] *Id*. at 201-202.

[442] 570 U.S. 254 (2013).

[443] There was always some question about whether Supreme Court decisions under the ACCA applied in an immigration setting, at least in ICE's view. But that issue has been put to rest, since the BIA has definitively held that the ACCA analysis regarding the categorical approach applies in an immigration context. *See Matter of Chairez-Castrejon*, 26 I&N Dec. 349

possession of a firearm, a violation of 18 U.S.C. §922(g). The government, under the ACCA, sought to enhance the penalty imposed on him due to his prior state convictions for burglary, robbery and felony harassment. The main focus of the Court's scrutiny was Descamps' California state burglary conviction. Descamps argued that his California state conviction did not fit the definition of a federal generic burglary offense because the state statute did not require that he enter the premises unlawfully. But the lower courts pointed out that the record of conviction established that Descamps' crime involved unlawful entry into a building.[444] As a result, the lower courts enhanced Descamps' sentence under the ACCA.

The Supreme Court reversed, holding that because the categorical analysis definitely established that California's burglary statute swept more broadly than the federal generic definition of burglary, the lower courts should not have engaged in a modified categorical approach that involved looking at the record of conviction. The modified categorical approach, the Court reiterated, is only resorted to when a divisible statute is involved. And the purpose of the modified categorical approach is simply to help a court determine which of various crimes in a divisible statute a defendant was convicted of – it is NOT used to determine in what conduct the defendant engaged.[445] Referring to its long history (at least since *Taylor* was decided in 1990) of using the categorical approach as a means of determining what crimes a defendant is convicted of, not what acts he committed, the Court again stressed that, absent a statute like the one in *Nijhawan*, what the defendant actually did is irrelevant where the relevant inquiry is of what crime he was convicted.

Having come this far, the Court then was left with the task of defining what is a "divisible" statute. This is a significant question, especially in the context of immigration law, since the

(BIA 2014), *order vacated in part, Matter of Chairez-Castrejon*, 26 I&N Dec. 478 (BIA 2015), adopting the categorical approach articulated in *Descamps* to the immigration context.

[444] Specifically, at the sentencing hearing in state court, the prosecutor proffered that Descamps broke into and entered a grocery store. Descamps did not object to this proffer.

[445] To underscore its point, the Court puts the term "modified categorical approach" in quotation marks, characterizing it not as a genuinely alternative approach, but as "a tool for implementing the categorical approach, to examine a limited class of documents to determine which of a statute's alternative elements formed the basis of a conviction." *Descamps*, 570 at 263-264.

BIA had held that a criminal statute is "divisible" if one or more elements of a criminal statute could be satisfied by conduct that either was deportable conduct or non-deportable conduct.[446] But the Supreme Court adopted a definition of "divisible" at odds with the one accepted by the BIA in *Lanferman*. The Court held that to determine whether a statute is truly divisible, a court looks at the elements in a statute that a fact-finder must unanimously, and beyond a reasonable doubt, agree exist in order to convict a defendant of violating the statute. The focus is on the elements of the criminal offense, not on the facts of the case:

> For example, an indivisible statute "requir[ing] use of a 'weapon' is not meaningfully different"—or so says the Ninth Circuit—"from a statute that simply lists every kind of weapon in existence ... ('gun, axe, sword, baton, slingshot, knife, machete, bat,' and so on)." In a similar way, every indivisible statute can be imaginatively reconstructed as a divisible one. And if that is true, the Ninth Circuit asks, why limit the modified categorical approach only to explicitly divisible statutes?
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> The simple answer is: Because only divisible statutes enable a sentencing court to conclude that a jury (or judge at a plea hearing) has convicted the defendant of every element of the generic crime. A prosecutor charging a violation of a divisible statute must generally select the relevant element from its list of alternatives. . . . And the jury, as instructions in the case will make clear, must then find that element, unanimously and beyond a reasonable doubt.[447]

Using this framework, the Court held that the lower courts should never have looked at any of the documents in the "record of

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[446] *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012), *overruled by Matter of Chairez-Castrejon*, 26 I&N Dec. 349 (BIA 2014). As an example, suppose a criminal statute proscribes "assault," defined elsewhere in the criminal code or in case law, to mean anything from an offensive touching to infliction of severe physical injury. While it is clear that simple assault (i.e., offensive touching) would not be a crime involving moral turpitude, intentionally inflicting severe physical harm would be a CIMT. Under the *Lanferman* view of the world, such a statute would be divisible, because at least one form of conduct (intentional infliction of severe physical injury) constitutes deportable conduct.

[447] *Id*. at 271-272.

conviction," since it was not necessary that they do that in order to determine of what offense Descamps was convicted. In other words, the statute under which he was convicted was not divisible. With this roadmap, the end result of the case was that Descamps' conviction should not have been enhanced under the ACCA. The Court summarizes its holding at the end of the opinion:

> Descamps may (or may not) have broken and entered, and so committed generic burglary. But § 459 – the crime of which he was convicted – does not require the factfinder (whether jury or judge) to make that determination. Because generic unlawful entry is not an element, or an alternative element, of § 459, a conviction under that statute is never for generic burglary. And that decides this case in Descamps' favor; the District Court should not have enhanced his sentence under ACCA.[448]

This is all confusing – even at second and third blush. But there is a resource that will help you understand *Descamps*' rationale better than we ever could. It is a video put together by Maureen Sweeney at the University of Maryland. After watching it, we are confident you will have a much better handle on the categorical approach as set forth in *Descamps*.[449]

The history of cases decided by the U.S. Supreme Court since *Taylor* reaffirms the Supreme Court's insistence on using the categorical approach to determine what crime an immigrant has been convicted of.[450] Again, the focus is on determining what the

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[448] *Id*. at 277.

[449] Maureen Sweeney, *Categorical Analysis of Immigration Consequences 7 28 14*, YouTube (July 28, 2014), https://www.youtube.com/watch?v=eDA-wVIedT0 (last visited October 13, 2020).

[450] *See, e.g., Lopez v. Gonzalez*, 549 U.S. 47 (2006) (holding that in order to qualify as a "drug trafficking offense" under INA § 101(a)(43)(B), an offense must be punishable at the felony level in federal court); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010) (holding that, in order for a defendant to have been convicted as a recidivist for purposes of the Controlled Substances Act, the focus must be on whether the defendant was actually charged and prosecuted as a recidivist in state court, not whether he might have been so charged and prosecuted); *Johnson v. U.S.*, 559 U.S. 133 (2010) (holding that where the state statute punishes conduct as slight as a tap on the shoulder without consent, such an offense cannot qualify as a "violent felony" for purposes of the ACCA); *Mellouli v. Lynch*, 575 U.S. 798 (2015) (holding that a state statute that criminalizes possession of a drug that does not appear on the federal drug schedules incorporated by the Controlled Substances Act does not make a non-citizen defendant deportable

elements of the offense are, and not on determining what a criminal defendant actually did.[451]

c. Examples of Crimes That Involve Moral Turpitude and Crimes That do not Involve Moral Turpitude.

For purposes of illustration only, we have provided below partial lists of crimes that the BIA and various courts have held either do or do not constitute crimes involving moral turpitude.[452] **These lists are provided for general guidance only. You should make certain to determine that the BIA has not changed its position on any of these issues and, in Nebraska, you should also determine what the Eighth Circuit's position is for any given crime**.

(1) Partial List of Crimes Involving Moral Turpitude.

A partial list of crimes that the Board of Immigration Appeals and various courts have found to constitute crimes involving moral turpitude include: murder, rape, robbery, kidnapping, voluntary manslaughter, some involuntary manslaughter offenses,[453] aggravated assaults, mayhem, theft offenses, child abuse, spousal abuse, and incest. Other crimes that have been held to constitute crimes involving moral turpitude are: failure to register as a sex

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under INA § 237(a)(2)(B)(I)); *Mathis v. United States*, 579 U.S. ___, 136 S. Ct. 2243 (2016) (holding that the ACCA does not permit enhancement of a federal sentence when the state court conviction sought to be used is broader than the federal generic crime, and also definitively stating that a statute that merely lists alternative facts, as opposed to different elements, is not divisible).

[451] Shortly after the *Mathis* decision was released by the Supreme Court in 2016, the Immigrant Defense Project released a practice advisory on how to analyze cases using the categorical approach, current through the *Mathis* decision. It can be found at https://www.immigrantdefenseproject.org/wp-content/uploads/2016/07/MATHIS-PRACTICE-ALERT-FINAL.pdf (last visited October 15, 2020).

[452] This list is taken largely from Ira J. Kurzban, *Immigration Law Sourcebook*, Chapter 3, § III. C. 1, and Kesselbrenner & Rosenberg, *Immigration Law and Crimes*, § 6.2(a). These publications are very helpful in locating authority on the issue of whether or not a particular crime is a crime involving moral turpitude.

[453] The Eighth Circuit has held that conviction of involuntary manslaughter under a Missouri statute constitutes a conviction of a crime involving moral turpitude. *Franklin v. I.N.S.*, 72 F.3d 571 (8th Cir. 1995).

offender,[454] fraud,[455] terroristic threats,[456] accessory after the fact to murder,[457] "assault plus" crimes (that is, those that involve assault coupled with some further aggravating element such as assault with attempt to murder,[458] assault with a deadly weapon,[459] aggravated assault,[460] assault on a domestic partner,[461] child abuse,[462] child endangerment,[463] sexual conduct with a minor,[464] assault on a police officer[465]), forgery,[466] robbery and burglary,[467]

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[454] *Matter of Tobar-Lobo*, 24 I&N Dec. 143 (BIA 2007). *But see Totimeh v. Attorney General*, 666 F.3d 109 (3d Cir. 2012) (declining to follow *Tobar-Lobo* and collecting cases criticizing *Tobar-Lobo*). Also, we are aware of a decision by Judge Fujimoto of the Omaha Immigration Court holding that failure to register as a sex offender under Neb. Rev. Stat. § 29-4004(3) is not a CIMT. *Matter of* _____, A#_____ (January 27, 2011), (redacted copy of opinion on file with the author). Judge Fujimoto distinguished the Nebraska statute from the California statute in *Tobar-Lobo*, noting that the decision in *Tobar-Lobo* involved a statute that required willful conduct on the part of the defendant, and also required a showing that he had previously been advised of the requirement to register. Judge Fujimoto noted that the Nebraska statute requires neither finding for a conviction. That decision is likely no longer good law in the Eighth Circuit. *See Bakor v. Barr*, 958 F.3d 732 (8th Cir. 2020).

[455] *Izedonmwen v. I.N.S.*, 37 F.3d 416 (8th Cir. 1994).

[456] *Chanmouny v. Ashcroft*, 376 F.3d 810 (9th Cir. 2004).

[457] *Cabral v. I.N.S.*, 15 F.3d 193 (1st Cir. 1994).

[458] *Clark v. Orabona*, 59 F.2d 187 (1st Cir. 1932).

[459] *Matter of Logan*, 17 I&N Dec. 367 (BIA 1980).

[460] *Pichardo v. I.N.S.*, 104 F.3d 756 (5th Cir. 1997).

[461] *Matter of Tran*, 21 I&N Dec. 291 (BIA 1996). *But see Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006).

[462] *Guerrero de Nodahl v. I.N.S.*, 407 F.2d 1405 (9th Cir. 1969).

[463] *Hernandez-Perez v. Holder*, 569 F.3d 345 (8th Cir. 2009).

[464] *Matter of Guevara Alfaro*, 25 I&N Dec. 417 (BIA 2011).

[465] *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988).

[466] *Matter of A-*, 5 I&N Dec. 52 (BIA 1953).

[467] *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982).

extortion,[468] receipt of stolen property with the knowledge the property is stolen,[469] driving a vehicle in a willful and wanton manner while trying to evade a police officer,[470] falsely obtaining a Social Security card,[471] use of a false driver's license,[472] counterfeiting,[473] perjury (usually),[474] willful tax evasion,[475] drug offenses where knowledge or intent is an element of the crime (*i.e.*, possession with intent to distribute),[476] embezzlement,[477] and passing of bad checks if fraud is an element of the offense.[478] Additionally, use of a weapon during the course of committing other crimes may indicate the existence of moral turpitude, thus making the conviction one of a crime involving moral turpitude.[479] And the BIA has held generally that accessory after the fact is a crime involving moral turpitude if the underlying offense is a crime involving moral turpitude.[480] Also, conviction of an attempt to commit a CIMT is a conviction of a CIMT even if the underlying statute does not mention attempt offenses.[481]

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[468] *Matter of F-*, 3 I&N Dec. 361 (BIA 1949).

[469] *Matter of Gordon*, 20 I&N Dec. 52 (BIA 1989); *Okoroha v. I.N.S.*, 715 F.2d 380 (8th Cir. 1983).

[470] *Matter of Ruiz-Lopez*, 25 I&N Dec. 551 (BIA 2011).

[471] *Lateef v. Dep't of Homeland Security*, 592 F.3d 926 (8th Cir. 2010).

[472] *Montero-Ubrii v. I.N.S.*, 229 F.3d 319 (1st Cir. 2000).

[473] *Matter of Castro*, 19 I&N Dec. 692 (BIA 1988).

[474] The BIA has held that a perjury conviction is a crime involving moral turpitude if materiality is an element, since the common law definition of perjury is the controlling one. *Matter of L-*, 1 I&N Dec. 324 (BIA 1942).

[475] *Wittgenstein v. I.N.S.*, 124 F.3d 1244 (10th Cir. 1997).

[476] *Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997).

[477] *Matter of Batten*, 11 I&N Dec. 271 (BIA 1965).

[478] *Matter of Khalik*, 17 I&N Dec. 518 (BIA 1980).

[479] *Matter of Logan*, 17 I&N Dec. 367 (BIA 1980).

[480] *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011).

[481] *Matter of Vo*, 25 I&N Dec. 426 (BIA 2011).

(2) Partial List of Crimes Not Involving Moral Turpitude.

A partial list of crimes that various tribunals have found not to constitute crimes involving moral turpitude includes: simple assault,[482] some involuntary manslaughter offenses,[483] malicious mischief (conviction under Washington statute),[484] indecent exposure,[485] most "possession" drug offenses,[486] contributing to the delinquency of a minor,[487] passing bad checks where intent is not an element of the offense,[488] inventing a Social Security number,[489] breaking and entering or unlawful entry where intent to commit a crime involving moral turpitude is not an element of the offense,[490] possession of burglar's tools,[491] joyriding,[492] and carrying a concealed weapon.[493]

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[482] *Matter of S-*, 9 I&N Dec. 688 (BIA 1962).

[483] *Matter of Lopez*, 13 I&N Dec. 725 (BIA 1971); *but see Franklin v. I.N.S.*, 72 F.3d 571 (8th Cir. 1995).

[484] *Rodriguez-Herrera v. I.N.S.*, 52 F.3d 238 (9th Cir. 1995).

[485] *Matter of H-*, 7 I&N Dec. 301 (BIA 1956). The same case also held that a conviction of gross indecency under Michigan law would be a crime involving moral turpitude.

[486] *Matter of Abreu-Semino*, 12 I&N Dec. 775 (BIA 1968).

[487] *Matter of P-*, 2 I&N Dec. 117 (BIA 1944), *but see Matter of Garcia*, 11 I&N Dec. 521 (BIA 1966), holding that taking indecent liberties with a minor is a crime involving moral turpitude.

[488] *Matter of Zangwill*, 18 I&N Dec. 22 (BIA 1981), *overruled on other grounds*, *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988).

[489] *Matter of* _____, A#_____ (BIA February 7, 2011), (redacted copy of opinion on file with author).

[490] *Matter of G-*, 1 I&N Dec. 403 (BIA 1943).

[491] *Matter of Serna*, 20 I&N Dec. 579, (BIA 1992) (*citing United States ex rel. Guarino v. Uhl*, 107 F.2d 399 (2d Cir. 1939) and *Matter of S-*, 6 I&N Dec. 769 (BIA 1955)).

[492] *Matter of M—*, 2 I&N Dec. 686 (BIA 1946).

[493] *Matter of Granados*, 17 I&N Dec. 726 (BIA 1979).

d. Statutory Exceptions.

There are two statutory exceptions to the "crimes involving moral turpitude" ground of inadmissibility: (1) juvenile offenses and (2) the "petty offense" exception.

(1) Juvenile Offenses.

The INA provides that a person who commits what would otherwise be a crime involving moral turpitude is not inadmissible if (1) the crime was committed when the person was less than 18 years of age, (2) if confined for the crime, the person has been released from confinement and (3) such commission and/or release from confinement took place more than five years before the date the person applies for a visa or for admission to the U.S.[494]

The juvenile offense exception of the statute applies if the juvenile was charged and prosecuted as an adult under state law. It does not apply if the case simply involved a juvenile adjudication in Juvenile Court, because such an offense is not "conviction" of a "crime."[495] There is also some authority for the proposition that the provisions of the Federal Juvenile Delinquency Act[496] preclude a finding that any crime committed by a juvenile under age 16 is a crime involving moral turpitude, even if the juvenile was tried as an adult.[497]

(2) "Petty Offenses."

If a non-citizen commits only one crime involving moral turpitude that involves a maximum possible penalty of one year or less **and**

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[494] INA § 212(a)(2)(A)(ii)(I), 8 U.S.C. § 1182(a)(2)(A)(ii)(I).

[495] *Matter of Devison-Charles*, 22 I&N Dec. 1362 (BIA 2000). The BIA has held that a "youthful trainee" designation under Michigan law is a "conviction" because it did not have the hallmarks of a juvenile adjudication, which means it must be civil in nature and must be such that it can neither be deemed a "conviction" ab initio nor ripen into a conviction upon the occurrence or nonoccurrence of subsequent events. *Matter of V-X-*, 26 I&N Dec. 147 (BIA 2013).

[496] 18 U.S.C. § 5031, *et seq*.

[497] *See Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981). This case involved a juvenile who was convicted as an adult in a Cuban court. The result might be different if the juvenile was tried as an adult in a U.S. state court. *See, e.g., Vieira-Garcia v. I.N.S.*, 239 F.3d 409 (1st Cir. 2001).

if the person was not sentenced to a term of imprisonment in excess of six months as a result of being convicted of such a crime, then the person is not inadmissible **solely** due to committing such a crime involving moral turpitude.[498]

Note that if there is an admission of the commission of a crime involving moral turpitude, but no conviction, the petty offense exception applies so long as the maximum possible sentence that could be imposed, in the event of a conviction, was one year or less. In such a situation, the second part of the statutory equation (length of actual sentence) is simply disregarded.

Note also that the petty offense exception is available only once. It applies only to the first CIMT offense. If a client has been convicted of a previous CIMT, she or he is not eligible for the petty offense exception.

e. Waivers.

It is not necessarily the end of the world for a client who has committed a crime involving moral turpitude to which a statutory exception does not apply. A waiver of this particular ground of inadmissibility is available to certain non-citizens, namely, those who committed a prostitution offense more than 15 years before applying for admission to the U.S. **or** other non-citizens inadmissible under certain grounds listed in the waiver statute who can establish that refusing them admission would result in extreme hardship to their U.S. citizen or permanent resident spouse, parent, son or daughter.[499]

A discussion of the procedures involved in applying for a waiver, and the evidence necessary to obtain one, is beyond the scope of this Guide. We suggest further exploration of this topic in one of the resources we list in section I.E., *supra*.

4. Multiple Criminal Convictions.

A non-citizen convicted of two or more crimes of any type, if the aggregate sentences to confinement were five years or more, is inadmissible.[500] For purposes of this ground of inadmissibility, it does not matter if the convictions were the result of a single trial or if they arose from a single scheme of criminal

[498] INA § 212(a)(2)(A)(ii)(II), 8 U.S.C. § 1182(a)(2)(A)(ii)(II).

[499] INA §212(h), 8 U.S.C. § 1182(h).

[500] INA § 212(a)(2)(B), 8 U.S.C. § 1182(a)(2)(B).

conduct. So long as the person was convicted of two or more criminal offenses of any kind, he or she is inadmissible under this provision.

Note the following with respect to this ground of inadmissibility:

(1) Unlike the ground of inadmissibility regarding crimes involving moral turpitude, here there must actually be a conviction –- a simple admission will not suffice.[501]

(2) The two or more crimes can be of **any** type, even crimes not involving moral turpitude.

(3) When counting time to determine if the five-year limit has been reached, one looks to all sentences initially imposed by the court, regardless of any periods of suspension or deferment.[502]

(4) When dealing with sentences of indeterminate length, one looks to the maximum term imposed to determine the length of the sentence imposed.[503]

(5) As in the case of certain individuals who have committed crimes involving moral turpitude, a waiver of this ground of inadmissibility is available.[504]

5. Drug Offenses.

There are two major categories of drug offenses that will cause non-citizens to be inadmissible: "general" drug offenses and drug trafficking offenses.

a. General Drug Offenses.

A non-citizen convicted of, or who admits having committed, or who admits committing acts that constitute the essential elements of any law or regulation of a state, the United States, or any foreign country relating to a

[501] *See* section V.D.2., *infra*, for a discussion of what constitutes a "conviction" for purposes of the INA.

[502] INA § 101(a)(48), 8 U.S.C. § 1101(a)(48).

[503] *Matter of D-*, 20 I&N Dec. 827 (BIA 1994).

[504] INA § 212(h), 8 U.S.C. § 1182(h).

controlled substance is inadmissible.[505] Attempts and conspiracies, as well as actual violations, also make one inadmissible.[506]

The definition of "controlled substance" is borrowed from 21 U.S.C. § 802(6). This includes all drugs listed in the schedules found in 21 U.S.C. § 812. These schedules are updated annually. In addition, a "controlled substance" also includes those substances listed by the U.S. Attorney General pursuant to his authority under 21 U.S.C. § 811. The Attorney General's list is located at 21 C.F.R. Part 1308.

b. *Mellouli v. Lynch*.[507]

In 2015, the United States Supreme Court decided a case that stresses how important it is for practitioners to determine if there is a complete match between the drug schedules of a state and those used by the Controlled Substances Act. In *Mellouli v. Lynch*, Mr. Mellouli, a non-citizen, pled guilty to a misdemeanor drug paraphernalia offense in Kansas state court. In one of the most bizarre sets of facts one might imagine, the "drug paraphernalia" Mellouli pled guilty to possessing was his sock, in which he had hidden "four orange tablets," which he conceded were a "controlled substance" as defined under Kansas law, although the exact type of controlled substance was not specified.[508] Because of the definition of "drug paraphernalia" under Kansas law (" all equipment and materials of any kind which are used. . . for. . . storing. . . a controlled substance. . . .[509]), Mellouli's sock, into which he had placed the controlled substance, fit the definition of "drug paraphernalia."

However, there were nine controlled substances on the Kansas schedules that did not appear on the schedules related to the federal Controlled Substances Act. As such, Mellouli's offense would not have qualified as a "controlled substances offense" under federal law, even though it did so qualify under state law. As a result of his conviction, ICE sought to deport Mellouli under the INA provision that makes it a deportable

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[505] INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II).

[506] *Id*.

[507] 575 U.S. 798 (2015). Although the issue in *Mellouli* was deportability and not inadmissibility, the analysis works in both contexts.

[508] Mellouli admitted, prior to being charged, that the pills were Adderall, but that fact does not appear in any of the criminal records in the case (perhaps due to a savvy criminal defense lawyer?).

[509] K.S.A. § 21-5701(f).

offense to be convicted of a crime related to a controlled substance.[510] Mellouli argued that, using the categorical approach, he had not been convicted of a crime related to a "controlled substance" as that term is defined in the Controlled Substances Act. The Immigration Court, Board of Immigration Appeals, and Eighth Circuit Court of Appeals all rejected Mellouli's argument.

But the Supreme Court thought Mellouli's argument had merit. The Court held that reference in the deportation statute to the Controlled Substances Act means that the controlled substance that forms the basis for removal of a non-citizen must be one listed in the federal schedules. Because Kansas' schedules included at least nine drugs not included on the federal schedules, and because, using the categorical approach, the Court had to assume that Mellouli was convicted of possessing one of the drugs not on the federal schedules, he could not be held to have been convicted of a crime related to a controlled substance "as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)." As a result, Mellouli was not removable under INA § 237(a)(2)(B)(i) due to his conviction.

This approach does not work in Nebraska, however. The Kansas controlled substance statute was indivisible; that is, it was not an element of the prosecution's case to prove which controlled substance Mr. Mellouli possessed – only that he possessed a controlled substance. In contrast, in Nebraska, the BIA has held that the prosecution must, as part of its burden of proof, prove what controlled substance a defendant possessed in order to obtain a conviction:[511]

> We conclude that § 28-416(3) is divisible vis-à-vis the controlled substance involved in the offense. Neb. Rev. Stat. § 28-416(3) provides, in pertinent part that a "person knowingly or intentionally possessing a controlled substance . . . shall be guilty of a Class IV felony." Section [id] Neb. Rev. Stat. § 28-405 provides the schedules of controlled substances. Nebraska state court decisions, the statute itself, and the conviction records all support the conclusion that the identity of the controlled substance is an element which must be proven under § 28-416(3). Nebraska courts have held that the identity of the controlled substance involved in an offense must be established. *See, e.g., State v. Watson*, 437 N.W.2d 142 (Neb. 1989); *State v.*

[510] INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i).

[511] See, e.g., *Matter of Soto*, A# [redacted], (BIA, July 13, 2017) (unpublished opinion on file with the author).

Nash, 444 N.W.2d 914, 919 (Neb. 1989); *see also State v. Clark*, 461 N.W.2d 576, 578 (Neb. 1990) (the State must prove that the defendant knowingly or intentionally possessed the substance). Further, relevant jury instructions indicate that the prosecution must prove the type of substance involved, such that the defendant was aware that it was a controlled substance he possessed. *State v. Heujahr*, 540 N.W.2d 566, 572-573 (Neb. 1995) (finding that the jury was properly instructed that "possession" of the specifically identified controlled substance means "either knowingly having it on one's person or knowing of the object's presence and having control over the object").[512]

c. Waivers.

With the exception of the waiver discussed in the next paragraph, there are no exceptions to the controlled substance offense ground of inadmissibility as far as those seeking admission as permanent residents are concerned. Any non-citizen convicted of, or who admits having committed, or who admits committing acts constituting the essential elements of a controlled substance offense is ***permanently*** inadmissible to the United States as an immigrant. There is a waiver available for this ground of inadmissibility in limited circumstances for non-immigrants.[513]

There is the possibility of waiving this ground of inadmissibility in a very limited circumstance. Anyone who is convicted of a single offense of

[512] *Id*., slip op. at pp. 2-3. In Iowa, the argument is more favorable, since the Iowa controlled substance statutes define a "controlled substance" to include a simulated controlled substance. Iowa Code Ann. § 124.401(1)(c)(2)(b). That is broader than the federal definition of a controlled substance found in the federal Controlled Substances Act at 21 U.S.C. § 841(a)(2) (punishing possession of a controlled substance and a counterfeit controlled substance, but not a simulated substance). And, in fact, the BIA has held that a *Mellouli* argument works under the Iowa statute. *See, e.g., Matter of Martinez Hernandez*, A# [redacted], (BIA March 14, 2018) (unpublished opinion on filed with the author), holding that the Iowa controlled substance statutes are violated regardless of whether the substance is a controlled substance, a counterfeit substance, or a simulated controlled substance. This, the BIA held, makes the Iowa statute indivisible and overbroad. Unfortunately for Nebraska practitioners, the Nebraska definition matches the federal one. *See* Neb. Rev. Stat. § 28-416(1), prohibiting possession, distribution, etc., of a "controlled substance" or a "counterfeit controlled substance," as those terms are defined in § 28-401.

[513] INA § 212(d)(5), 8 U.S.C. § 1182(d)(5).

simple possession of 30 grams or less of marijuana is eligible to apply for the waiver to this ground of inadmissibility.[514]

d. Drug Trafficking Offenses.

If an immigration or consular officer knows **or has reason to believe** that a non-citizen is engaged in drug trafficking or has trafficked in any controlled substance, such a person is inadmissible.[515] This ground of inadmissibility also applies to those who aid, abet, assist, conspire or collude with drug traffickers.[516]

Note that this ground of inadmissibility does not require a conviction -- one is inadmissible even if the DHS or State Department "has reason to believe" that the person has been engaged in drug trafficking. Thus, even if charges of drug trafficking are ultimately dismissed, the underlying facts might be used by the DHS to deny admission to the person.[517] "Reason to believe" equates to the adjudicating officer having probable cause to believe the person engaged in drug trafficking.[518]

This particular ground of inadmissibility applies only to drug trafficking offenses, which do not include simple possession of a controlled substance.[519] However, a conviction of a drug trafficking crime, or existence of a reasonable belief that a person has possessed a controlled substance with intent to distribute will implicate this ground of inadmissibility. And the sweep is broad. Even a single sale of a small amount of a controlled substance is sufficient to sustain a finding that someone is a drug "trafficker."[520] On the other hand, the Fifth Circuit, in an unpublished opinion, has held that simply offering to sell a controlled substance is not a drug trafficking offense because the federal Controlled

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[514] *See* the introductory language to INA § 212(h), 8 U.S.C. § 1182(h).

[515] INA § 212(a)(2)(C)(i), 8 U.S.C. § 1182(a)(2)(C)(i).

[516] *Id*.

[517] *Matter of Rico*, 16 I&N Dec. 181 (BIA 1977).

[518] *Matter of U-H-*, 23 I&N Dec. 355, 356 (BIA 2002).

[519] A conviction for simple possession, however, will present a problem for the person under the provisions of INA § 212(a)(2)(A)(ii), 8 U.S.C. § 1182(a)(2)(A)(i)(II).

[520] *See Matter of Roberts*, 20 I&N Dec. 294 (BIA 1991), in which the respondent was convicted of a single sale of what appeared to be a relatively small amount of cocaine.

Substances Act prohibits only the knowing and intentional distribution of a controlled substance.[521]

In 1999, the statute was amended to include certain family members within its ambit. Now, anyone who is the spouse, son or daughter of an non-citizen who is inadmissible as a drug trafficker is himself inadmissible if, within five years of seeking admission, such person (1) obtained any benefit, financial or otherwise, from the non-citizen's drug trafficking and (2) knew, or should have known, that such benefit was the result of drug trafficking activity.[522] The standard that applies to family members is the "reason to believe" standard that applies to the principal drug trafficker, so defined family members are inadmissible if a DHS or consular official has "reason to believe" that such family members are within the statutory definition.

6. Prostitution and Commercialized Vice.

This ground of inadmissibility applies both to those who engage in prostitution themselves and those who participate in some way in prostitution or commercialized vice.[523] Anyone who is coming to the U.S. to engage in prostitution, *or one who has engaged in prostitution within 10 years of the date she or he seeks admission*, is inadmissible.[524] This is true even if prostitution is lawful in the non-citizen's home country.[525]

One who, directly or indirectly, procures or attempts to procure or import anyone for purposes of prostitution is inadmissible.[526] As with persons engaging in

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[521] *Davila v. Holder*, 381 F. App'x 413 (5th Cir. 2010). Other courts have disagreed with this holding. *See, e.g., Pascual v. Holder*, 707 F.3d 403 (2d Cir. 2013).

[522] INA § 212(a)(2)(C)(ii), 8 U.S.C. § 1182(a)(2)(C)(ii).

[523] The term "prostitution" means engaging in promiscuous sexual intercourse for hire. A finding that one has "engaged" in prostitution requires a consideration of the elements of continuity and regularity, as opposed to isolated acts. 22 C.F.R. § 40.24(b). Although this definition applies in an inadmissibility context, the BIA has held that, for purposes of analyzing whether running a prostitution business is an aggravated felony, the term "prostitution" is not limited to sexual intercourse, but is defined as engaging in, or agreeing or offering to engage in, sexual conduct for anything of value. *Matter of Ding*, 27 I&N Dec. 295 (BIA 2018).

[524] INA § 212(a)(2)(D)(i), 8 U.S.C. § 1182(a)(2)(D)(i).

[525] 22 C.F.R. § 40.24(c).

[526] INA § 212(a)(2)(D)(ii), 8 U.S.C. § 1182(a)(2)(D)(ii).

prostitution themselves, this bar to admissibility applies if anyone has engaged in any of these acts within 10 years of seeking admission.

Finally, this ground of inadmissibility applies to anyone coming to the U.S. to engage in any other commercialized vice, whether or not it involves prostitution.[527]

As with drug trafficking, this ground of inadmissibility applies whether or not the person has actually been convicted of any of the acts described in the statute.

Those deemed inadmissible under this statutory provision can seek a waiver of inadmissibility.[528]

7. Serious Criminal Activity Where a Person has Asserted Immunity from Prosecution.

If one (1) has committed a "serious criminal offense"[529] (2) has been granted immunity from criminal jurisdiction, (3) as a result of the offense and exercise of immunity, has left the U.S. and (4) has not later fully submitted to the jurisdiction of a U.S. court with respect to the offense, then such a person is inadmissible.[530]

This ground of inadmissibility is usually applied to foreign diplomats who engage in a serious criminal offense, although the terms of the statute are not limited to diplomats. Certain non-citizens may qualify to seek a waiver of this ground of inadmissibility.[531]

8. Significant Traffickers in Persons.

This ground of inadmissibility was added by section 111(d) of the Victims of Trafficking and Violence Protection Act of 2000, Pub.L. 106-386, 114 Stat. 1464, October 28, 2000, and was amended by §§ 222(f)(1) and 234 of Pub.L. 110-457,

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[527] INA § 212(a)(2)(D)(iii), 8 U.S.C. § 1182(a)(2)(D)(iii).

[528] INA § 212(h), 8 U.S.C. § 1182(h).

[529] This term is defined in the INA as including (1) any felony, (2) any crime of violence as defined in section 16 of title 18 of the United States Code, and (3) any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or prohibited substances if such crime involves personal injury to another. INA § 101(h), 8 U.S.C. § 1101(h).

[530] INA § 212(a)(2)(E), 8 U.S.C. § 1182(a)(2)(E).

[531] INA § 212(h), 8 U.S.C. § 1182(h).

122 Stat. 5044, Dec. 23, 2008. Two classes of principal non-citizens are inadmissible under the provisions of the INA regarding trafficking in persons.[532]

The first class consists of any non-citizen who "commits or conspires to commit human trafficking offenses" either in the U.S. or outside the U.S. The second class is comprised of non-citizens whom the DHS or a consular officer knows or has reason to believe have been knowing aiders, abettors, assisters, conspirators, or colluders with those who traffic in "severe forms of trafficking in persons."[533]

In addition to these two classes of principal non-citizens who are inadmissible, the statute also provides, akin to the statute on drug trafficking,[534] that anyone who the DHS or consular officer knows or has reason to believe is the spouse, son, or daughter of a non-citizen who falls in one of the two principal classes described above, is himself or herself inadmissible if, within the past five years, such spouse, son, or daughter has obtained any financial or other benefit from human trafficking activity engaged in by the principal non-citizen.[535] In addition, such spouse, son or daughter is also inadmissible if he or she knew or reasonably should have known that the financial or other benefit received within the past five years was the product of illicit trafficking.[536]

9. Terrorist Activity.

As one might imagine, this ground of inadmissibility was broadened in the wake of the September 11, 2001, attacks on the United States. The USA PATRIOT Act of 2001[537] added several provisions to this particular ground of inadmissibility.

The statute[538] is interesting and is worth reading, mainly because of the wide range of activities it now includes. Because Nebraska criminal practitioners may not encounter many of these activities, we have not discussed them all here, but we have set forth some of the categories of non-citizens to which this ground of

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[532] INA § 212(a)(2)(H)(i), 8 U.S.C. § 212(a)(2)(H)(i).

[533] *Id*.

[534] INA § 212(a)(2)(C)(ii), 8 U.S.C. § 1182(a)(2)(C)(ii).

[535] INA § 212(a)(2)(H)(ii), 8 U.S.C. § 1182(a)(2)(H)(ii).

[536] *Id*.

[537] Pub. L. No. 107-56, 115 Stat. 272, October 26, 2001.

[538] INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B).

inadmissibility applies because they may come into play even in Nebraska state criminal proceedings.

First, the statute provides that the following categories of non-citizens are inadmissible on terrorist grounds: (1) those who have engaged in a "terrorist activity," (2) those whom the DHS or a consular official knows, or has reason to believe, are engaged in or are likely to engage in a "terrorist activity," (3) those who have, under circumstances indicating an intention to cause death or serious bodily harm, incited "terrorist activity," (4) those who are "representatives" of certain organizations involved with or linked to terrorism, (5) those who are members of foreign terrorist organizations, and (6) those who have used their position of prominence within any country to endorse or espouse terrorist activity.[539]

In addition, the statute also makes the spouse or child of such principal non-citizens inadmissible if the activity causing the principal non-citizen to be inadmissible took place within the past five years[540] unless such spouse or child did not know and should not reasonably have known of the terrorist activity of the principal non-citizen or whom the DHS or consular officer believes has renounced such terrorist activity.[541]

Second, the statute defines "terrorist activity." Again, the sweep of the acts included is breathtaking. "Terrorist activity" includes the following acts, and also includes threats, attempts or conspiracies to do any of the following acts: (1) the highjacking or sabotage of any conveyance, including an aircraft, vessel or vehicle, (2) the seizing or detaining, and threatening to kill, injure or continue to detain, another individual in order to compel a third person or governmental entity to do or abstain from doing any act as an explicit or implicit condition for the release of the person held, (3) a violent attack upon an internationally protected person, as defined in 18 U.S.C. § 1116(b)(4), or upon the liberty of such a person, (4) assassination, and (5) the use of any biological agent, chemical agent, nuclear weapon or device, explosive, firearm or other weapon or dangerous device (other than for purely personal monetary gain), with the intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.[542]

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[539] INA § 212(a)(3)(B)(i), 8 U.S.C. § 1182(a)(3)(B)(i).

[540] *Id*.

[541] INA § 212(a)(3)(B)(ii), 8 U.S.C. § 1182(a)(3)(B)(ii).

[542] INA § 212(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii).

The statute also defines "engage in terrorist activity,"[543] "representative" of a terrorist organization,[544] and "terrorist organization."[545]

Given the very broad definition of "terrorist activity," it is not hard to imagine that some non-citizens who commit certain acts that most would not think of as "terrorist acts" might be held to be inadmissible as "terrorists." For example, suppose that your client is convicted of domestic assault because he assaulted his domestic partner using a weapon of some sort.[546] Under a literal reading of the statute, the client has engaged in a "terrorist activity" because he used a weapon, other than for purely personal monetary gain, with intent to endanger the safety of another individual.[547] Most of us understand that aggravated assault is a bad thing, but it is counterintuitive to think of such an act as a "terrorist activity." This is life under the USA PATRIOT Act. Having said that, however, I am unaware of a client found to be inadmissible based on the "terrorist activity" ground for engaging in such behavior. But that does not mean it couldn't happen.

There is no waiver available for this ground of inadmissibility.

10. Misrepresentation.

There are two categories of misrepresentation that make a non-citizen inadmissible. The first is misrepresentation of a material fact if the purpose of such misrepresentation is to obtain a visa, other documentation, admission into the U.S., or any other benefit provided under the INA.[548] The second is a false claim of U.S. citizenship for any purpose related to an immigration benefit **or any benefit under federal or state law.**[549] The second category of inadmissibility could certainly come into play if a non-citizen is engaged in an act or is convicted

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[543] INA § 212(a)(3)(B)(iv), 8 U.S.C. § 1182 (a)(3)(B)(iv).

[544] INA § 212(a)(3)(B)(v), 8 U.S.C. § 1182(a)(3)(B)(v).

[545] INA § 212(a)(3)(B)(vi), 8 U.S.C. § 1182(a)(3)(B)(vi).

[546] This type of conviction would also make a client who is currently in the U.S. in proper immigration status deportable under INA § 237(a)(2)(E), 8 U.S.C. § 1227(a)(2)(E).

[547] INA § 212(a)(2)(B)(iii)(V), 8 U.S.C. § 1182(a)(2)(B)(iii)(V).

[548] INA § 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i).

[549] INA § 212(a)(6)(C)(ii)(I), 8 U.S.C. § 1182(a)(6)(C)(ii)(I). *See Matter of Richmond*, 26 I&N Dec. 779 (BIA 2016) for the BIA's take on what it takes to trigger this ground of inadmissibility.

of an offense involving trying to obtain a benefit under state law (perhaps trying to get a driver's license, for example) by falsely claiming to be a U.S. citizen.

As with some of the other grounds of inadmissibility, this ground does not require an actual conviction of the acts set forth, although certainly a conviction would implicate these provisions of the Act. Certain individuals may be eligible to apply for a waiver of the first category of misrepresentation listed above,[550] however, there is no waiver available regarding the second category of inadmissibility. Nevertheless, there is a statutory exception. If the false claim to U.S. citizenship is made by a non-citizen whose parents are or were U.S. citizens, if the non-citizen permanently resided in the U.S. since reaching age 16, and if the non-citizen reasonably believed at the time he or she made a false claim of U.S. citizenship that he or she was a U.S. citizen, then such an individual is not inadmissible.[551]

11. International Child Abductors.

If a U.S. court grants to any person custody of a U.S. citizen who is a "child" and a non-citizen takes or withholds such a child outside of the U.S. in violation of such custody order, the non-citizen is inadmissible to the U.S. until such time as the child is returned to the custodial parent.[552] This ground of inadmissibility does not apply if the child is located in a country that is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction.[553] This ground of inadmissibility also applies to those who are spouses, children, parents, siblings or agents of non-citizens who abduct children in violation of the statute.[554]

12. Aggravated Felons.

"Aggravated felonies" are crimes defined in INA § 101(a)(43)[555] and are discussed more fully in this Guide in the context of deportation.[556] They are

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[550] INA § 212(i), 8 U.S.C. § 1182(i).

[551] INA § 212(a)(6)(C)(ii)(II), 8 U.S.C. § 1182(a)(6)(C)(ii)(II).

[552] INA § 212(a)(10)(C), 8 U.S.C. § 1182(a)(10)(C).

[553] INA § 212(a)(10)(C)(iii), 8 U.S.C. § 1182(a)(10)(C)(iii).

[554] INA § 212(a)(10)(C)(ii)(III), 8 U.S.C.§ 1182(a)(10)(C)(ii)(III).

[555] 8 U.S.C. § 1101(a)(43).

[556] *See* section V.D.6., *infra*.

discussed briefly here, however, because of the ramifications they have on the issue of applying for admission to the U.S.

Conviction of an aggravated felony is not a ground of inadmissibility as such, but it does have admissibility implications. INA § 212(a)(9)(ii)[557] provides that an individual convicted of an aggravated felony is permanently barred from applying for admission to the U.S. if she or he has been ordered removed under INA § 240[558] **unless**, prior to his or her attempting to re-enter the U.S., she or he has received permission from the U.S. Attorney General to apply for admission.

This provision raises several fine points of immigration law. First, simple conviction of an aggravated felony does not carry with it the § 212(a)(9)(ii) bar -- that only arises if, subsequent to being convicted of an aggravated felony, a non-citizen is ordered removed from the U.S. Of course, anyone convicted of an aggravated felony will almost certainly be removed from the U.S., so this first point is almost purely hypothetical. Second, a conviction of an aggravated felony, together with a subsequent order of removal, is what triggers the bar of § 212(a)(9)(ii). Thus, a person's simply admitting commission of an aggravated felony will not, in and of itself, trigger the bar.[559] Third, although conviction of an aggravated felony technically does not make a non-citizen inadmissable, such a person is not even allowed to apply for admission unless he or she has received advance approval to do so from the U.S. Attorney General. As a practical matter, then, one convicted of an aggravated felony who is removed from the U.S. as a result is inadmissible unless he or she gets a stamp of approval from the Attorney General for permission to **try** to re-enter the country. Of course, the Attorney General is unlikely to give such approval any time soon after conviction and removal.

13. Miscellaneous Grounds of Inadmissibility.

Other grounds of inadmissibility in the INA relate to espionage, sabotage and commercial interference,[560] foreign policy considerations,[561] membership in

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[557] 8 U.S.C. § 1182(a)(9)(ii).

[558] 8 U.S.C. § 1229a.

[559] Remember, however, that admitting to an aggravated felony may render a non-citizen inadmissible under some other subsection of INA § 212(a)(2), 8 U.S.C. § 1182(a)(2), depending on the type of crime the client admits to committing.

[560] INA § 212(a)(3)(A), 8 U.S.C. § 1182(a)(3)(A).

[561] INA § 212(a)(3)(C), 8 U.S.C. § 1182(a)(3)(C).

totalitarian parties,[562] participation in Nazi persecution or general genocide,[563] alien smuggling,[564] draft evaders,[565] aliens previously removed,[566] unlawfully present,[567] or unlawfully present after previous immigration violations,[568] polygamy,[569] and unlawful voting.[570] Because Nebraska practitioners are unlikely to encounter these grounds with any frequency, they are not discussed in any detail here. However, if you have a non-citizen who is charged with an offense that may trigger one of these grounds of inadmissibility, you should investigate the inadmissibility provisions relating to such charges.

D. Grounds of Deportability.

Section 237 of the INA[571] describes the categories of non-citizens who are subject to being deported from the U.S. As with the categories of non-citizens who are inadmissible, there are several grounds of deportability not related to criminal convictions or activity. However, those grounds will not be discussed in this Guide.

As a reminder, "deportation" refers to proceedings to remove non-citizens from the U.S. who have already been admitted, as defined in INA § 101(a)(13).[572] See the discussion of this point at section V.B.2., *supra*.

1. General Considerations.

You will notice that several of the grounds of inadmissibility, or at least the terms used, overlap with grounds of deportability. The definition of the overlapping terms used (*i.e.*, "conviction," "moral turpitude," etc.) are the same for purposes of

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562 INA § 212(a)(3)(D), 8 U.S.C. § 1182(a)(3)(D).

563 INA § 212(a)(3)(E), 8 U.S.C. § 1182(a)(3)(E).

564 INA § 212(a)(6)(E), 8 U.S.C. § 1182(a)(6)(E).

565 INA § 212(a)(8)(B), 8 U.S.C. § 1182(a)(8)(B).

566 INA § 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A).

567 INA § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B).

568 INA § 212(a)(9)(C), 8 U.S.C. § 1182(a)(9)(C).

569 INA § 212(a)(10)(A), 8 U.S.C. § 1182(a)(10)(A).

570 INA § 212(a)(9)(D), 8 U.S.C. § 1182(a)(9)(D).

571 8 U.S.C. § 1227.

572 8 U.S.C. § 1101(a)(13).

both inadmissibility and deportability. Although the criminal grounds of deportability under § 237(a)(2) of the INA overlap considerably with the criminal grounds of inadmissibility under § 212(a)(2), they are not identical. Thus, it is important to read the statutes closely. Some criminal grounds of deportability do not have a counterpart in criminal grounds of inadmissibility.[573] And even those grounds of inadmissibility and deportability that relate to the same category of offense may have differences.

As a reminder, your client should be concerned with grounds of deportability if he or she is in, and was "admitted" to, the United States. To beat a dead horse one last time, clients who physically entered the U.S. without documents ("EWIs") are not subject to grounds of deportability under § 237 of the INA since they were not "admitted" to the U.S. Rather, if those clients face removal from the U.S., they will be dealing with one of the grounds of inadmissibility under § 212 of the INA[574] discussed previously.

2. Requirement of "Conviction."

Another point worth noting is that nearly all criminal grounds of deportability require that a "conviction" exist before they apply.[575] This is not true for all criminal grounds of inadmissibility.[576] The following sections contain a discussion of various issues relating to the requirement of a "conviction."

a. Definition of "Conviction."

Section 101(a)(48)(A) of the INA[577] states that a "conviction" exists if a formal judgment of guilt has been entered by a court.[578] The statute

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[573] Two examples are the grounds of deportability for firearms offenses, found at INA § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C), and domestic violence offenses, found at INA § 237(a)(2)(E), 8 U.S.C. § 1227(a)(2)(E), neither of which has an inadmissibility counterpart.

[574] 8 U.S.C. § 1182.

[575] The two exceptions are the grounds of deportability relating to "drug abusers or addicts" and those who violate civil protection orders. These grounds of deportability are discussed in sections V.D.7. and V.D.9., *infra*.

[576] Recall, for example, that the "crime of moral turpitude" ground of inadmissibility found at INA § 212(a)(2)(A)(i)(I) applies even if a person admits having committed such an offense, or admits committing acts that constitute the essential elements of such an offense.

[577] 8 U.S.C. § 1101(a)(48)(A).

[578] The finding of guilt must be made beyond a reasonable doubt. *See Matter of Eslamizar*, 23 I&N Dec. 684 (BIA 2004), holding that a defendant found guilty of a "violation" under Oregon law was not "convicted" of a criminal offense for immigration purposes because

further provides that a conviction exists even if adjudication of guilt has been withheld where (1) a factfinder has found the person guilty, the client has entered a plea of guilty or *nolo contendere*, or the person has admitted facts sufficient to warrant a finding of guilt and (2) the judge has ordered some form of punishment, penalty or restraint on the person's liberty to be imposed.

It is useful to look at this definition in the context of various types of Nebraska criminal dispositions to determine whether or not a client has been "convicted" of a criminal offense for purposes of the INA.

(1) Pretrial Diversion.

A client who receives pretrial diversion under the provisions of Neb. Rev. Stat. §§ 29-3601 to 29-3609 has not been "convicted" of a criminal offense for immigration purposes because the first element of the test in INA § 101(a)(48)(A) has not been met –- no judge or jury has found the client guilty, the client has not entered a plea of guilty or *nolo contendere*, nor has the client admitted facts sufficient to warrant a finding of guilt.[579] As a result, any client who successfully completes pretrial diversion in Nebraska has not been "convicted" of a criminal offense for immigration purposes.

(2) Deferral of Judgment, Adjudication or Sentencing.

In 2019, the Nebraska Legislature adopted LB 686 which, among other things, allows a court to defer entry of a judgment of conviction under certain circumstances.[580] However, for immigration purposes, a client whose judgment has been deferred

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under the statute one could be convicted of a violation under a "preponderance of the evidence" standard. *See also Rubio v. Sessions*, 891 F.3d 344 (8th Cir. 2018), holding that convictions for violating Columbia, Missouri city ordinances are "convictions" for immigration purposes because the fundamental aspect of a criminal proceeding is whether guilt was proven beyond a reasonable doubt. Because that was the burden of proof involved, convictions of municipal ordinances are "convictions" even though some tribunals consider ordinance violations to be "civil" rather than "criminal" in nature.

[579] *See Matter of Grullon*, 20 I&N Dec. 12 (BIA 1989), holding that no "conviction" occurred where the respondent qualified for a pretrial diversion program in Florida. The Florida program, as described in *Grullon***,** mirrors Nebraska's in the sense that the client has not been found guilty of any offense, nor has he entered a plea of guilty at the time of entry into the pretrial diversion program.

[580] Neb. Rev. Stat. § 29-2292.

under this statute has still been "convicted" of a crime for immigration purposes because (1) the court has made a finding of guilt and (2) ordered some form of punishment, penalty or restraint on the client's liberty. [581]

Similarly, if a court finds a defendant guilty but then defers sentencing, or accepts a guilty plea from a defendant but then defers the adjudication of guilt while requiring the defendant to engage in some sort of activity such as community service, the client has been "convicted." This is because the client has been found guilty or has entered a plea of guilty and the court has ordered some form of punishment, penalty or restraint on the client's liberty. In fact, even a guilty plea coupled with the mere imposition of court costs, and no other penalty, satisfies the definition of "conviction."[582] For these reasons, depending on the exact contours of the process, a client who is involved in a Nebraska drug court program may have been "convicted" under the INA test if the client enters a plea of guilty and the court imposes a form of punishment, penalty or restraint on the client's liberty; i.e., aa requirement that the client participate in drug court activities.[583]

(3) Probation.

For the reasons articulated in the preceding section, a client who is sentenced to probation by a court has been "convicted" of a criminal offense because he has either been found guilty of a crime or has pled guilty and had some sort of punishment, penalty

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[581] *See, e.g., Matter of Punu* 22 I&N Dec. 224 (BIA 1998). In that case, the BIA considered a Texas statute that permitted the defendant to enter a guilty plea and allowed the court, once it had accepted such a plea, to withhold adjudication of guilt and (in the case at bar) place the defendant on probation. The BIA held that the 1996 amendments to the INA that resulted in the current version of § 101(a)(48)(A) clearly showed Congress' intent to treat such a situation as a "conviction" for immigration purposes.

[582] *Matter of Cabrera*, 24 I&N Dec. 459 (BIA 2008). *But see Guzman Gonzalez v. Sessions*, 894 F3d 131 (4th Cir. 2018), holding that imposition of costs under North Carolina state law is not a "punishment or penalty" as those terms are used in 8 U.S.C. § 1101(a)(48)(A).

[583] The author has heard from some Nebraska practitioners that clients have been able to convince judges in a drug court setting to refrain from making them enter a guilty plea and then, once the drug court procedures are complete, dismiss the case. If that is possible, then the client has not been "convicted" for immigration purposes because the first prong of the statutory test under the INA has not been satisfied. But if the court requires entry of a guilty plea, and then allows the client to participate in drug court, that <u>is</u> a "conviction" for immigration purposes.

or restraint on liberty imposed by virtue of being put on probation.[584]

(4) Juvenile Adjudications.

A juvenile delinquency adjudication in a juvenile case is not a "conviction" for purposes of the INA.[585]

(5) Forum of Convictions.

(a) Federal vs. State Convictions.

Unless otherwise set forth in a specific provision of the INA, it does not matter whether a person is convicted of a state crime or a federal crime -- so long as the crime fits the categorical definition of a crime described in § 212 or § 237 of the INA, the conviction will make the person inadmissible or deportable. In addition, a person may be inadmissible or deportable as the result of conviction in a tribal or municipal court.[586]

(b) Foreign Convictions.

In most cases, foreign convictions will also qualify as "convictions" under the provisions of the INA. In order to qualify as a "conviction," the foreign crime must, *inter alia*, meet U.S. standards under most circumstances.[587]

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[584] *See* Neb. Rev. Stat. § 29-2246(4), defining "probation" as a sentence under which a person found guilty of a crime upon verdict or plea is released by a court subject to conditions imposed by the court and subject to supervision.

[585] *Matter of Devison-Charles*, 22 I&N Dec. 1362 (BIA 2000).

[586] *See, e.g.,* 8 U.S.C. § 237(a)(2)(E)(i), INA § 237(a)(2)(E)(i), relating to domestic violence convictions.

[587] *See, e.g., Matter of De La Nues*, 18 I&N Dec. 140 (BIA 1981) (holding that conduct underlying a foreign conviction that would be merely a juvenile offense under U.S. standards does not qualify as a "conviction" for immigration purposes); and *Matter of McNaughton*, 16 I&N Dec. 569 (BIA 1978), aff'd, 612 F.2d 457 (9th Cir. 1980) (holding that a securities fraud conviction under British law is substantially similar to conduct that would be criminal under U.S. law, and is therefore a "conviction" for immigration purposes).

(6) Finality of Conviction.

Historically, a conviction must also be "final" in order for it to qualify as a "conviction" under the INA.[588] This means, generally, that the client must have exhausted all direct appeals available to him or her as a matter of right, or have waived such appeals.[589] The BIA has ruled on this issue, holding that the finality requirement survived the adoption of IIRIRA.[590]

b. Post Conviction Proceedings and Their Effect on Whether a Person has been "Convicted."

(1) Statutory Set-Aside Under § 29-2264.

Under the provisions of Neb. Rev. Stat. § 29-2264(2), a person convicted of certain criminal offenses may, under specified circumstances, request that the sentencing court set aside the conviction. If the court grants such a request, its order rehabilitates the defendant in a number of ways, including nullifying the conviction, and removing all civil disabilities imposed as a result of the conviction.[591]

Nevertheless, a beneficiary of this statutory scheme has still been "convicted" of a criminal offense for immigration purposes, and the set-aside granted by a court does not change that fact.[592]

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[588] *See, e.g., Smith v. Gonzalez*, 468 F.3d 272 (5th Cir. 2006); *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988); *Pino v. Landon*, 349 U.S. 901 (1955). *But see Abiodun v.* Gonzales, 461 F.3d 1210 (10th Cir. 2006), *Montenegro v. Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004) and *Griffiths v. I.N.S.*, 171 F.3d 994, 1008-1010 (5th Cir. 1999), (holding that the amendments to the statute made by IIRIRA eliminated the requirement that a conviction be "final" in order to render one deportable).

[589] *Pino,* 349 U.S. 901. *See also Will v. INS*, 447 F.2d 529 (7th Cir. 1971).

[590] *Matter of J.M. Acosta*, 27 I&N Dec. 420 (BIA 2018).

[591] Neb. Rev. Stat. § 29-2264(5).

[592] *See, e.g., Matter of Roldan*, 22 I&N Dec. 512 (1999); *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). In *Roldan*, the BIA held that if a court vacates a defendant's conviction for reasons related to post conviction rehabilitation, such a conviction still exists for purposes of § 101(a)(48)(A). In *Pickering*, the government alleged, and the BIA concluded, that the criminal court in which the defendant had been convicted set aside the conviction in order to avoid negative immigration consequences. The Sixth Circuit reversed the BIA's decision affirming the Immigration Judge's order of deportation, however, because it held that the government had not proven, by clear and convincing evidence, the reasons why the criminal

(2) Statutory Vacatur under § 29-1819.02.

This statute allows a criminal defendant to request a vacatur of a conviction in the event that the defendant was not given the advisement required by the statute at the time of entering a guilty or *nolo contendere* plea. The purpose of the advisement is to inform the defendant that, if he is not a United States citizen, he may face immigration consequences as the result of a guilty plea. In the event that the advisement is not given, the court, upon the defendant's request, must vacate the conviction and allow the defendant to enter a plea of not guilty.[593]

In such circumstances, vacatur of the conviction is due to deficiencies in the underlying proceedings, and not because of post conviction rehabilitation, and therefore such a vacatur eliminates the conviction for immigration purposes.[594]

(3) *Padilla* Post Conviction Proceedings.

So-called *Padilla* post conviction proceedings attack the

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court had vacated the conviction. *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006). However, the Sixth Circuit agreed with the BIA's general holding that, if the government had proven its allegations, a "conviction" would have still existed under the INA test.

But the Eighth Circuit does not agree with the Sixth Circuit's burden of proof analysis. *Andrade-Zamora v. Lynch*, 814 F.3d 945 (8th Cir. 2016). In that case, the Eighth Circuit held that, in the context of a cancellation of removal case, the non-citizen bears the burden of proof to show why a state court vacated his conviction, and if he presents no evidence showing that the conviction was vacated due to a substantive or procedural defect, he has not carried his burden of proof to show that the conviction was not vacated for a *Pickering*-type purpose. Curiously, the Eighth Circuit does not discuss or cite the Sixth Circuit's decision in *Pickering* in arriving at its holding.

In 2018, the BIA reaffirmed its approach in *Pickering*, and indicated it would apply *Pickering's* reasoning on a nation-wide basis. *Matter of Conde*, 27 I&N Dec. 251 (BIA 2018). The import of this decision is that if a conviction is vacated for an underlying procedural or substantive defect, it is no longer a "conviction" for purposes of the § 101(a)(48) analysis.

[593] Neb. Rev. Stat. § 29-1819.02(2). *See* the earlier detailed discussion of Nebraska cases interpreting this provision in section I.D.2.b.(2), *supra*.

[594] *See, e.g., Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006), holding that vacatur of a conviction under an Ohio statute that is similar to Neb. Rev. Stat. § 29-1829.02 nullifies the conviction for immigration purposes.

underlying validity of convictions due to non-compliance by counsel with the duty, under the Sixth Amendment, to advise defendants of immigration consequences of guilty pleas. If a conviction is vacated pursuant to such a proceeding, it is because of an underlying legal defect in the original criminal proceedings, and, as a result, no "conviction" would exist under the principles articulated in *Adamiak*.

(4) Pardons.

Although pardons do not negate "convictions," they may help avoid removal in certain cases, such as deportability for CIMTs, aggravated felonies, and high-speed flights.[595]

(5) Miscellaneous Considerations.

The BIA has held that, under a New York statute authorizing late-reinstatement of a direct appeal in a criminal case, a "conviction" still exists even if the state conviction is re-opened or is under collateral attack.[596]

3. Relief from Removal.

Unlike grounds of inadmissibility, there are no "waivers" available to clients who face removal under § 237 of the INA. Instead, the parallel concept that allows a client to avoid deportation is called "relief from removal," which can be thought of as in the nature of an affirmative defense. Some clients may have available to them various forms of relief from removal which, if successfully asserted, will prevent the clients from being deported. Examples of such forms of relief could include asylum claims,[597] withholding of removal claims,[598] cancellation of removal claims,[599] and so forth. While a complete consideration of all potential forms of relief from removal is beyond the scope of this Guide, the important concept to remember is that some clients may have the ability to avoid

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[595] INA § 237(a)(2)(A)(v), 8 U.S.C. § 1227(a)(2)(A)(v).

[596] *Matter of Cardenas-Abreu*, 24 I&N Dec. 795 (BIA 2009). The Second Circuit reversed *Abreu*, however, and so the holding is not good law in that circuit. *Abreu v. Holder*, 378 F. App'x 59 (2d Cir. May 24, 2010).

[597] INA § 208, 8 U.S.C. § 1158.

[598] INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A).

[599] INA § 240A(a), 8 U.S.C. § 1229b(a) (for certain permanent residents) and INA § 240A(b), 8 U.S.C. § 1229b(b) (for certain non-permanent residents).

deportation despite being convicted of certain crimes. Such relief from removal will have to be sought before an Immigration Court if the clients are placed in removal proceedings.

4. Crimes Involving Moral Turpitude.

One who is convicted of a crime involving moral turpitude is deportable if (1) the conviction occurred within five years of the date of the person's last admission to the U.S. and (2) the crime of which the person is convicted carries a possible sentence of one year or longer.[600] If the person became a lawful permanent resident under § 245(j) of the INA[601] because he or she was a qualified informant, then she or he is deportable if convicted of a crime involving moral turpitude within 10 years of his or her last entry into the U.S. Substantively, the definition of "moral turpitude" for purposes of deportability is the same as it is for purposes of inadmissibility.[602]

It is important to note that conviction of an attempt or conspiracy to commit a crime involving moral turpitude, although perhaps carrying less severe consequences in the criminal law context,[603] makes no difference in the immigration context. One who is convicted of an attempted crime involving moral turpitude faces exactly the same immigration consequences as he or she would had he or she been convicted of the underlying substantive offense.[604]

a. Conviction Within Five Years of Last Admission.

The BIA has held that, in order for this ground of deportability to apply, the crime involving moral turpitude must have been committed within five years of the date of the admission by virtue of which a person was then

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[600] INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i).

[601] 8 U.S.C. § 1255(j).

[602] *See* section V.C.3., *supra*.

[603] *See, e.g.,* Neb. Rev. Stat. § 28-201.

[604] *See, e.g.*, *Matter of McNaughton*, 16 I&N Dec. 569 (BIA 1978). There is some disagreement as to whether a person has the required mental state to commit a crime of moral turpitude if he or she only needs to act recklessly in order to be convicted. Some courts have held that it is "legally incoherent" for a person to attempt to act recklessly. *Gill v. I.N.S*, 420 F.3d 82 (2d Cir. 2005); *Knapik v. Ashcroft*, 384 F.3d 84 (3d Cir. 2004). In this type of circumstance, being convicted of an attempt, as opposed to the underlying substantive offense, would benefit the client in terms of immigration consequences.

present in the United States.[605] The facts of the case illustrate the rule. Mr. Alyazji was admitted to the United States as a non-immigrant in 2001. In 2006 he adjusted his status to that of a lawful permanent resident ("green card holder"). In 2008, he was convicted of a crime involving moral turpitude. The question the BIA had to decide was whether Mr. Alyazji's adjustment of status counted as an "admission," which re-started the five-year clock, and therefore made him deportable, or whether the adjustment of status was not such an admission.

The BIA held that the most faithful reading of the statute is that an "admission" for purposes of the five-year rule is an admission by which the person actually is physically admitted to the United States. So, although adjustment of status is clearly an "admission" in the sense that one must demonstrate he or she is admissible (or, to say it another way, not inadmissible) at the time of adjustment of status, it is not an "admission" for purposes of the five-year rule in the deportation statute. As a result, Mr. Alyazji was not deportable, because he committed the CIMT in 2008, which was more than five years after his physical admission into the U.S. in 2001.

It is important to understand that the five- or ten-year dates referred to in the statute begin from the date of the person's ***last*** physical admission to the U.S., regardless of how long the person has been living here. Suppose, for example, your client is a Grecian national lawful permanent resident who has been living in the U.S. for 50 years. She or he decides to visit her or his family in Greece in 2021 and returns to the States on December 3, 2021, after a three-week visit to Greece. If she or he is convicted of a crime involving moral turpitude that carries a maximum possible penalty of one year or longer at any time before June 3, 2026, he or she will be deportable under this provision.

b. Length of Maximum Possible Sentence.

Another important point is that a conviction of certain misdemeanors will render a non-citizen deportable under this provision. Because the statute speaks of crimes that carry *possible* sentences of one year or longer, this includes crimes for which the maximum possible sentence is exactly one year. In Nebraska, this would include Class I misdemeanors if the underlying crime involves "moral turpitude." So even a single misdemeanor conviction may carry deportability consequences.

[605] *Matter of Alyazji*, 25 I&N Dec. 397 (BIA 2011).

5. Multiple Criminal Convictions.

This ground of deportability applies when a client is **at any time after admission** convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless if the client was confined as a result of such convictions and regardless of whether the convictions arose out of a single trial.[606]

As you can see, this ground of deportability differs from its cousin ground of inadmissibility[607] in several ways:

(1) The crimes under the deportability statute must be crimes involving moral turpitude, whereas the inadmissibility offenses need not involve moral turpitude.

(2) The crimes under the deportability statute must not arise out of a single scheme of criminal conduct, whereas the inadmissibility ground would apply even if the multiple convictions arise out of the same scheme of criminal misconduct.

(3) There is no minimum length of sentence or confinement required for the second or subsequent convictions to trigger the ground of deportability, whereas under the inadmissibility statute, the aggregate sentences to confinement imposed for the offenses must be at least five years.

6. Aggravated Felonies.

Appropriately named, this is one of the more aggravating provisions in the entire INA. Generally, it provides that one convicted of an "aggravated felony" at any time after admission is deportable.[608]

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[606] INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii). The BIA has held that a defendant who was convicted in two counties of forgery and possession of stolen property based on his use of multiple stolen credit or debit cards to obtain items of value from several retail outlets on five separate occasions over the course of a day was convicted of crimes not arising out of a single scheme of criminal misconduct. *Matter of Islam*, 25 I&N Dec. 637 (BIA 2011).

[607] INA § 212(a)(2)(B), 8 U.S.C. § 1182(a)(2)(B).

[608] INA § 237 (a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii). This is often the least of an immigration client's worry, however. A client who has been convicted of an aggravated felony is barred from seeking a whole host of immigration benefits or forms of relief from removal for which she or he might be eligible in the absence of an aggravated felony conviction.

The definition of "aggravated felony" is found in § 101(a)(43) of the INA.[609] This term first made its appearance as a result of the Anti-Drug Abuse Act of 1988[610] and has expanded dramatically since then. A great deal of federal legislation enacted since 1988 that has dealt with deportation has added to the list of crimes included in the definition of "aggravated felony." A discussion of all of the provisions of the aggravated felony definition is well beyond the scope of this Guide, since analyses of what crimes constitute aggravated felonies literally fill books. Following are highlights of some of the more frequently-encountered subdivisions of the statute. Counsel are invited to consult the analyses of individual Nebraska criminal statutes charts, and are cautioned to look closely at the entire aggravated felony statute when assessing a criminal case.

a. Murder, Rape or Sexual Abuse of a Minor.

The "murder" part of this statute[611] is one of the original provisions of the aggravated felony statute. By its terms, "murder" includes all levels of crimes classified as "murder," but would not include such crimes as manslaughter.[612]

The provisions regarding rape and sexual abuse of a minor were added by IIRIRA in 1996 and, due to the fact that the terms are not defined in the statute, have frequently been the subject of litigation.

Because the statute does not define "rape," courts have been left to determine what Congress meant by that term. Most current criminal statutes do not use the term "rape." Instead, they use the term "sexual assault." Courts are therefore left to struggle with whether "rape" always is "sexual assault" under applicable state statutory schemes. "Statutory

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609 8 U.S.C. § 1101(a)(43).

610 Pub. L. No. 100-690, 102 Stat. 4181, Nov. 18, 1988.

611 INA § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A).

612 Probably. The BIA, in *Matter of N-W-*, 25 I&N Dec. 748 (BIA 2012) calls this statement into question. The respondent in *M-W-*, while driving under the influence of alcohol, rear-ended a car, killing the occupants on impact. He was charged with second degree murder under a Michigan statute. The BIA held that one convicted of murder in violation of a statute requiring only a showing of extreme recklessness or a "malignant heart" has been convicted of "murder" for purposes of the aggravated felony statute even in a case where the defendant was voluntarily intoxicated and no intent to kill was established. If the BIA really means what it says in this opinion, it dramatically expanded the definition of "murder" for aggravated felony purposes.

rape" is likely "rape" for purposes of the aggravated felony statute,[613] although in light of the Supreme Court's re-emphasis on the categorical approach as articulated in *Descamps*, this may be an open question. In *Castro-Baez v. Reno*,[614] the Ninth Circuit held that sexual assault committed by drugging the victim constituted "rape" as defined by the aggravated felony statute.[615] But, again, given the emphasis of following the federal "generic" definition of an offense set forth in *Descamps*, this interpretation may be open to challenge. Other questions also arise with regard to what constitutes "rape." In a non-precedent decision, the BIA held that sexual contact without penetration is not "rape" for purposes of the aggravated felony statute.[616] And, more recently, the BIA held that "rape" means vaginal, anal or oral intercourse, or digital or mechanical penetration, no matter how slight.[617]

"Sexual abuse of a minor" is defined very broadly by the BIA.[618] Although the BIA has defined "minor" to include any victim of sexual

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[613] *See, e.g., Silva v. Gonzalez*, 455 F.3d 26 (1st Cir. 2006).

[614] 217 F.3d 1057 (9th Cir. 2000).

[615] The defendant argued that the California statute under which he was convicted was not coterminous with the federal sexual assault statutory definitions, and therefore did not constitute "rape." The Ninth Circuit disagreed, holding that it had to define the term by employing the ordinary, contemporary, and common meaning of that word and then determine whether or not the conduct prohibited by the California statute fell within that definition. *Id*. at 1059.

[616] *Matter of Gutierrez-Martinez*, 2004 WL 880256 (BIA 2004) (unpublished).

[617] *Matter of Keeley*, 27 I&N Dec. 146 (BIA 2017).

[618] *See, e.g., Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999), holding that a respondent convicted of indecent exposure to a minor in the minor's presence for the purposes of sexual gratification had been convicted of "sexual abuse of a minor" for purposes of the aggravated felony statute. However, the Ninth Circuit has held that conviction of indecent conduct in the presence of a minor under an Arizona statute was not "sexual abuse of a minor" because the statute neither required that the minor be touched or even be aware of the defendant's conduct. *Rebilas v. Keisler*, 506 F.3d 1161 (9th Cir. 2007). The defendant was convicted of public indecency to a minor by, "in the presence of a minor, intentionally or knowingly engaged in an act of sexual contact and was reckless about whether a minor under the age of fifteen years was present." *Id*. at 1164. In *Matter of Guevara Alfaro*, 25 I&N Dec. 417 (BIA 2011), the BIA held that any intentional sexual conduct by an adult with a child involves moral turpitude, as long as the perpetrator knew or should have known that the victim was under the age of 16.

abuse under the age of 18,[619] in *Esquivel-Quintana*,[620] the Supreme Court held that consensual sexual intercourse between an adult and a person age 16 or over is not "sexual abuse of a minor" under the aggravated felony definition. However, if the crime of which one is convicted fits the categorical definition of "sexual abuse of a minor," even a state misdemeanor conviction for sexual abuse of a minor constitutes an aggravated felony under § 101(a)(43)(A).[621]

As can be seen from this very brief discussion, this is a very complex area of law. Practitioners are invited to consult the analyses of individual Nebraska criminal statutes at the end of this Guide for a more detailed consideration of how various Nebraska statutes would be interpreted.

b. Drug Trafficking.

Section 101(a)(43)(B) of the INA[622] states that "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 24(c) of title 18, United States Code)," is an aggravated felony. Thus, a drug offense can be an aggravated felony in two ways: (1) it constitutes "illicit trafficking" or (2) it is statutorily defined in the federal Controlled Substances Act (CSA) as a "drug trafficking crime."

The first way in which an offense can be a "drug trafficking" offense is if the defendant is convicted of an offense that involves unlawful trading or dealing for profit in a drug classified as a "controlled substance" under the CSA.[623] This would include offenses whose elements involve sale of a controlled substance or possession of a controlled substance with intent to deliver.

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[619] *Matter of V-F-D*, 23 I&N Dec. 859 (BIA 2006).

[620] 137 S. Ct. 1562, 198 L. Ed. 2d 22 (2017).

[621] *Matter of Small*, 23 I&N Dec. 448 (BIA 2002). *See also Garcia-Urbano v. Sessions*, 890 F.3d 726 (8th Cir. 2018), holding that violation of a Minnesota statute criminalizing even consensual sexual intercourse between a defendant who was age 18 and his victim who was age 15 constituted aggravated felony sexual abuse of a minor.)

[622] 8 U.S.C. § 1101(a)(43)(B).

[623] 21 U.S.C. § 802, *et seq*. *See, e.g., Matter of Davis*, 20 I&N Dec. 536, 541 (BIA 1992). If a drug offense does not include an element of dealing or delivery, but instead requires only an offer to sell, it is not a "trafficking" offense. *See, e.g., Matter of Garcia-Torres*, A45 864 724 (BIA October 19, 2006), (unpublished); *Davila v. Holder*, 381 F. App'x 413 (5th Cir. 2010).

The second way in which a drug offense can be a "trafficking" offense is if it is defined as a "drug trafficking crime" in the CSA. Until 2006, many individuals faced deportation as "aggravated felons" if they were convicted of simple drug possession offenses that were classified as felonies under applicable state law, since the BIA held that an offense could be an aggravated felony if it was classified as a felony under either state or federal law.[624] In 2006, the United States Supreme Court had occasion to interpret this portion of the statute in *Lopez v. Gonzalez*.[625] In *Lopez*, the Court held that, in order to be an aggravated felony under § 101(a)(43)(B), a drug trafficking offense must meet the **federal** definition of "felony" –- a state drug offense, even if classified as a felony under applicable state law, does not constitute an aggravated felony under § 101(a)(43)(B) unless the state offense would qualify as a "trafficking" offense under the federal definition in the CSA. This decision resolved a split in the circuits, some of which had held that drug trafficking offenses that were merely misdemeanors under federal law, but felonies under state law, qualified as "aggravated felonies" under § 101(a)(43)(B). In the wake of *Lopez*, a drug trafficking offense must be a felony under the federal definition in order to constitute an aggravated felony.[626] Recognize, however, that under the CSA, one type of simple possession offense is considered to be a felony "trafficking" offense: simple possession of flunitrazepam.[627]

One of the issues left open by the *Lopez* decision was whether a second or subsequent state drug offense for simple possession could be considered to be an aggravated felony. The issue arose because, under federal law, simple possession of a controlled substance after a prior final conviction for drug possession is a felony.[628] This is sometimes referred to as the federal "recidivist possession" felony provision. In 2010, the Supreme Court held that second or subsequent simple possession offenses are not

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[624] *Matter of Yanez*, 23 I&N Dec. 390 (BIA 2002).

[625] 549 U.S. 47 (2006).

[626] The defendant in *Lopez* was convicted of helping someone else possess cocaine in South Dakota. South Dakota state law treated such conduct as the equivalent of possessing cocaine, which was a felony offense under state law. Mere possession of cocaine is not a felony under the Controlled Substances Act (21 U.S.C. § 844(a)), however.

[627] 21 U.S.C. § 844(a). Prior to 2010, simple possession of crack cocaine was also a drug trafficking offense, but the statute was amended by § 3 of the Fair Sentencing Act of 2010, Pub. L. No. 111-220, (August 3, 2010), to omit any reference to crack cocaine.

[628] *Id*.

aggravated felony offenses under INA § 101(a)(43)[629] unless the state conviction is based on the fact of a prior conviction.[630] In other words, in order for a defendant to be a recidivist "drug trafficker," he or she must either admit his or her status or a judge or jury must determine that the defendant is a recidivist. A simple subsequent conviction of a drug possession offense, without more, will not suffice.

The Fifth Circuit, in an unpublished opinion, has held that a defendant who pled guilty to simple possession of marijuana, but whose sentence was enhanced on the basis of a prior conviction for delivery of cocaine, was guilty of a drug trafficking offense due to the enhancement provision, which made the defendant a drug trafficker under the recidivist provision of the Controlled Substances Act.[631] This seems like quite a stretch, and there do not appear to be any other holdings finding that a simple possession offense is a drug trafficking offense based only on the fact of the sentence being enhanced for a prior conviction.

As discussed earlier,[632] the Supreme Court has ruled that one convicted under a Georgia statute of possession of marijuana with intent to distribute was not convicted of an aggravated felony trafficking offense where he distributed a small amount of marijuana for no remuneration.[633]

c. Firearms Trafficking.

INA § 101(a)(43)(C)[634] states that "illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18, United States Code) or in explosive materials (as defined in section 841(c) of that title)" is an aggravated felony. This is a fairly straightforward provision and, unlike drug trafficking crimes, here, "trafficking" is used in the ordinary sense of the word –- i.e., to sell or deal in "firearms," "destructive

629 8 U.S.C. § 1101(a)(43).

630 *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010).

631 *Okon v. Holder*, No. 10-60347, 2011 WL 1773514 (5th Cir. May 10, 2011).

632 *See* section V.C.3.b., *supra*.

633 *Moncrieffe v. Holder*, 569 U.S. 184 (2013).

634 8 U.S.C. § 1101(a)(43)(C).

devices," or "explosive materials" as those terms are defined in the applicable statutes.[635]

d. Firearms Offenses.

INA § 101(a)(43)(E)(ii)[636] provides that conviction of any offense "described in" certain sections of the U.S. criminal code relating to firearms are aggravated felonies. It is important, in analyzing any state criminal offenses, to make certain that you match the elements of the state offense with the crimes described in the federal statutes listed in INA § 101(a)(43)(E)(ii). Consult the statutory analysis charts for analysis of how individual Nebraska firearms offenses match the federal statutes. One important fact to note is that the United States Supreme Court has held that a state firearms offense can be an aggravated felony firearms offense if it is otherwise described in the applicable federal statutes even though the state offense does not contain an interstate commerce element.[637]

e. Crimes of Violence.

INA § 101(a)(43)(F)[638] makes a "crime of violence" an aggravated felony **if** the term of imprisonment imposed by a court for such crime is at least one year. "Crime of violence" is defined in 18 U.S.C. § 16 as "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." **However, in 2018 the Supreme Court declared subsection (b) to be unconstitutionally vague** (see discussion below). That subsection can no longer be used to describe an aggravated felony crime of violence.

Subsection (a) describes an offense that has, **as an element**, the use, attempted use, or threatened use of physical force against the person or property of another. A typical example of such an offense is first degree sexual assault, Neb. Rev. Stat. § 28-319. Conviction under this statute requires proof of, *inter alia*, sexual penetration. That constitutes the use

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635 INA § 101(a)(43)(E), 8 U.S.C. § 1101(a)(43)(E), also describes offenses that relate to firearms and explosive devices and makes them aggravated felonies.

636 8 U.S.C. § 1101(a)(43)(E)(ii).

637 *Torres v. Lynch*, 136 S. Ct. 1619, 194 L. Ed. 2d 737 (2016).

638 8 U.S.C. § 1101(a)(43)(F).

of physical force against the person of another and, therefore, fits the definition of "crime of violence" under 18 U.S.C. § 16(a).[639]
It is worth looking briefly at a few noteworthy decisions interpreting this statute.

(1) *Leocal v. Ashcroft.*[640]

In *Leocal v. Ashcroft*, the Supreme Court held that a client convicted of driving under the influence of alcohol and causing serious bodily injury was not convicted of an aggravated felony because, under the Florida statute at issue in that case, a showing of mere negligence was necessary in order to sustain a conviction. Because there was no mens rea requirement to convict under the Florida statute, the Supreme Court held that the offense was not a "crime of violence" under 18 U.S.C. § 16, and therefore not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F).[641] The Court had no trouble holding that conviction under such a statute did not satisfy the requirements of 18 U.S.C. § 16(a), because the Court interpreted "use" as requiring "active employment," something not present in a statute where mere negligent conduct will sustain a conviction.

(2) *Matter of Sanudo*.[642]

In *Matter of Sanudo*, the BIA held that conviction for domestic battery in violation of §§ 242 and 243(e) of the California Penal Code did not constitute a "crime of violence" because the statutes criminalize "willful and unlawful use of force or violence" against

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[639] In other illustrative examples, the Eighth Circuit has held that pointing a gun at another person is categorically a crime of violence under 8 U.S.C. § 16(a) because it involves the threatened use of physical force against another person (*Reyes-Soto v. Lynch*, 808 F.3d 369 (8th Cir. 2015)), and the BIA has held that a conviction for an aggravated felony under a Puerto Rico statute that does not require the use of violent physical force is not categorically a crime of violence under this same statutory provision (*Matter of Guzman-Polanco*, 26 I&N Dec. 713 (BIA 2016).

[640] 543 U.S. 1 (2004).

[641] Until recently, there was some question as to whether *Leocal* could also be read to stand for the proposition that reckless behavior is not sufficient to meet the definition of "crime of violence" under 18 U.S.C. § 16. That was settled by the Supreme Court in *Borden v. United States*, ___ S.Ct. ___, 2021 WL 2367312 (June 10, 2021), holding that reckless behavior is **not** sufficient to meet the "crime of violence" definition.

[642] 23 I&N Dec. 968 (BIA 2006).

another. This language, the BIA held, was so broad that it could include conduct that was not "violent" in the sense intended by 18 U.S.C. § 16, and therefore did not meet the definition of "crime of violence" necessary to turn the conviction into an aggravated felony under INA § 101(a)(43)(F).

(3) *Johnson v. United States* (*Johnson I*).[643]

Although not an immigration case, *Johnson v. United States* agreed in general with the BIA's reasoning in *Sanudo*. In *Johnson*, the defendant was convicted of knowingly possessing ammunition after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). The government sought prosecution enhancement under 18 U.S.C. § 924(e), which provides that a person who has 3 previous convictions for a "violent" felony must be imprisoned for a minimum of 15 years. The term "violent felony" is defined in 18 U.S.C. § 924(e)(2)(B) in a very similar way to "crime of violence" in 18 U.S.C. § 16.

One of the Florida statutes under which the defendant in *Johnson* was convicted allowed conviction for actually and intentionally touching or striking another person against that person's will **or** intentionally causing bodily harm to another.[644] The Supreme Court held that, for purposes of a "violent felony," there must be "violent" force involved; i.e., force capable of causing physical pain or injury to another.[645] And the Court specifically drew a comparison between the definition of "violent felony" in 18 U.S.C. § 924(e)(2)(B)(i) and the definition of "crime of violence" in 18 U.S.C. § 16(a).[646] As a result, it appears that any assaultive offense that does not involve physical force sufficient to cause pain or injury to another cannot be a "crime of violence" for purposes of 18 U.S.C. § 16(a).

(4) *Johnson v. United States* (*Johnson II*).[647]

One of the more momentous cases decided in this area was the

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643 559 U.S. 133 (2010).

644 *Id*. at 136.

645 *Id.* at 140-141.

646 *Id.*

647 576 U.S. 591 (2015).

2015 Supreme Court opinion in *Johnson v. U.S* (not to be confused with the 2010 *Johnson v. United States* opinion by the Supreme Court). The 2015 case is important not only because of the holding in the case but also because of what it portends for the future of the "crime of violence" analysis in an immigration context. *Johnson* involved a defendant who had a long criminal history. He was prosecuted for the federal offense of being a felon in possession of a firearm. The government sought to enhance his sentence under the provisions of the Armed Career Criminal Act (ACCA) due to, among other things, his previous conviction under Minnesota law of possessing a short-barreled shotgun. The government sought to enhance Johnson's sentence under the so-called "residual clause" of the ACCA.[648] The Supreme Court held that the residual clause violates the Due Process Clause because it is void for vagueness. The Court found two major problems with the residual clause: (1) it requires a judge to imagine the "ordinary case" offense, regardless of what the actual facts are of the case, and (2) it fails to define how much risk is necessary to qualify a crime as a violent felony.[649] In holding the residual clause to be an unconstitutionally vague statute, the Supreme Court overruled 4 of its prior decisions that mandated the use of the "ordinary case" approach to determining whether the residual clause applied.[650]

(5) *Voisine v. United States*.[651]

In 2016, the Supreme Court decided a case that, at first blush, seemed to stand for the proposition that a mens rea of recklessness is sufficient to constitute a crime of violence under the aggravated felony statute. But that interpretation turned out not to be correct.[652] In *Voisine v. United States*, the Court held that a

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[648] That provision is found at 18 U.S.C. § 924(e)(2)(B), and defines a "violent felony" as one that "otherwise involves conduct that presents a serious potential risk of physical injury to another."

[649] *Id*. at 597.

[650] The cases overruled by *Johnson* are *James v. United States*, 550 U.S. 192 (2007); *Begay v. United States*, 553 U.S. 137 (2008); *Chambers v. United States*, 555 U.S. 122 (2009); and *Sykes v. United States*, 564 U.S. 1 (2011).

[651] 136 S. Ct. 2272, 195 L. Ed. 2d 736 (2016).

[652] *See Borden, supra*., specifically recognizing that the holding in *Voisine* was statutory-specific, and does not control the more generic analysis of whether reckless behavior is

reckless domestic assault qualifies as a "misdemeanor crime of domestic violence" under 18 U.S.C. §§ 921(a)(33)(A) and 922 (g)(9). The Court reasoned that the language in the statute[653] includes not only knowing or intentional acts,[654] but also those committed recklessly.

(6) *Sessions v. Dimaya*.[655]

In *Dimaya*, the Supreme Court finished the work it began in *Johnson II, supra*., and held that 18 U.S.C. § 16(b) is also unconstitutionally vague. After the *Johnson* opinion held that the residual clause of the Armed Career Criminal Act (ACCA) was unconstitutionally vague, Mr. Dimaya mounted a challenge to the constitutionality of subsection (b) of 18 U.S.C. § 16, given the similarity in language between the two statutes.[656] The Supreme Court, without much discussion, held that, for the same reasons it articulated in *Johnson* in holding the ACCA residual clause unconstitutional, subsection (b) was also unconstitutionally vague.

(7) *Stokeling v. United States*.[657]

In a bit of a surprise holding, the Supreme Court held, in a 5-4

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a sufficient mens rea to constitute a crime of violence. *Borden, supra*., ___ S.Ct. at ___, 2021 WL 2367312 at 5.

[653] 18 U.S.C. § 921(a)(33)(A), which defines a "misdemeanor domestic violence offense" as one that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim."

[654] The Court has held that knowing and intentional acts violate the statute. *United States v. Castleman*, 572 U.S. 157 (2014).

[655] 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018).

[656] Compare the language of the two statutes. The residual clause of the ACCA defines a "violent felony" as, *inter alia*, a federal felony offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(3)(2)(B)(ii). Subsection (b) of 18 U.S.C. § 16 defines a "crime of violence" as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

[657] 139 S. Ct. 544, 202 L. Ed. 2d 512 (2019).

decision, that a conviction of violation of the Florida robbery statute qualifies as a "violent felony" for purposes of the ACCA, because the physical force required under the ACCA, for purposes of analyzing state robbery convictions, only requires the force, however slight, necessary to overcome the victim's resistance. As an example, the Court held that, at common law, the force required to pull a diamond pin out of a woman's hair constituted sufficient force to qualify as robbery. And that type of force, the Court held, is sufficient to qualify a Florida robbery offense as an ACCA predicate "violent felony."

The Court noted that in *Johnson II, supra*., it had held that there must be greater force to qualify a battery as a "violent felony" for ACCA purposes. But, the Court held, that is because the common law definition of battery, from which Congress borrowed in writing the ACCA, required force sufficient to cause pain to the victim. Not so with respect to common law robbery.

The dissent, written by Justice Sotomayor, wasn't buying this distinction:[658]

> Starting today, however, the phrase "physical force" in § 924(e)(2)(B)(I) will apparently lead a Janus-faced existence. When it comes to battery, that phrase will look toward ordinary meaning; when it comes to robbery, that same piece of statutory text will look toward the common law. To the extent that is a tenable construction, the majority has announced a brave new world of textual interpretation.[659]

Nevertheless, five votes are more than four, so for purposes of analyzing robbery offenses for ACCA purposes, even a slight force is enough to qualify as sufficient force to constitute a "violent felony." As Justice Sotomayor points out, the result will be different if the predicate offense in question is battery.

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[658] The voting split on this case was interesting. Justice Thomas wrote the majority opinion, in which Justices Breyer, Alito, Gorsuch and Kavanaugh joined. Chief Justice Roberts, along with Justices Ginsburg and Kagan, joined Justice Sotomayor in the dissent.

[659] *Id*. at 560.

f. Theft Offenses.

INA § 101(a)(43)(G)[660] states that a "theft offense," including receipt of stolen property, or a "burglary" offense is an aggravated felony if the client is sentenced to a term of imprisonment of at least one year. The United States Supreme Court has held that the definitions of the terms "theft" and "burglary" must be uniform, and must not depend on the definitions given those terms by various states.[661] In *Taylor*, the Supreme Court adopted a "generic, contemporary" meaning of burglary (i.e., the definition that is now used in most states' criminal codes).[662] The Court held, "Although the exact formulations vary, the generic, contemporary meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime."[663]

In *Gonzalez v. Duenas-Alvarez*,[664] the Supreme Court held that aiding and abetting is included in the generic definition of "theft," which it defined as "taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent."[665]

The BIA has held that a respondent who was convicted of unlawful driving and taking a vehicle in violation of California law was convicted of a "theft offense."[666] The Eighth Circuit has held that one who violates Iowa's identity theft statute has committed a "theft offense."[667]

The Supreme Court has held that, in order to be guilty of aggravated identity theft under 18 U.S.C. § 1028A(a)(1), a defendant must know that

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[660] 8 U.S.C. § 1101(a)(43)(G).

[661] *Taylor v. United States*, 495 U.S. 575 (1990).

[662] *Id*. at 598.

[663] *Id*. In a later decision, the BIA held, applying this definition, that burglary of a vehicle under Texas law is not a "burglary offense" under the aggravated felony definition, because a structure was not involved. *Matter of Perez*, 22 I&N Dec. 1325 (BIA 2000).

[664] 549 U.S. 183 (2007).

[665] *Id*. at 189.

[666] *Matter of V-Z-S*, 22 I&N Dec. 1338 (BIA 2000).

[667] *United States v. Mejia-Barba*, 327 F.3d 678 (8th Cir. 2003).

the "means of identification" she or he unlawfully transferred, possessed, or used did, in fact, belong to another person.[668]

In an interesting case out of the Third Circuit, the Court held that where a theft offense also involves fraud and deceit, the requirements of both INA § 101(a)(43)(G)[669] **and** INA § 101(a)(43)(M)(i)[670] must be met in order for the offense to be an aggravated felony.[671]

In *United States v. Figueroa-Estrada*,[672] the Fifth Circuit held that conviction under a state statute that can be violated either by depriving the owner of his property or by "appropriating" the property is a divisible statute as to whether it is a theft offense, because the "appropriating" division of the statute does not fit the generic definition of "theft" adopted by the Supreme Court in *Taylor, supra*. As a result, the Fifth Circuit used the modified categorical approach to determine which part of the statute the defendant violated.[673] Under a strict categorical analysis required by *Descamps*, this approach is no longer viable, since the statute in question merely involves different means of committing the same offense, and not elements of separate crimes.

In a 2016 opinion, the Fourth Circuit held that, using the categorical approach, an embezzlement is not a "theft" for purposes of this analysis because the generic definition of a "theft" involves taking another's property without his or her consent, whereas at least the initial taking of

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668 *Flores-Figueroa v. United States*, 556 U.S. 646 (2009).

669 8 U.S.C. § 1101(a)(43)(G).

670 8 U.S.C. § 1101(a)(43)(M)(i). This provision includes under the definition of an aggravated felony a fraud offense in which the loss to the victim exceeds $10,000.

671 *Nugent v. Ashcroft*, 367 F.3d 162 (3d Cir. 2004).

672 416 F. App'x 377 (5th Cir. 2011).

673 Although decided before *Descamps*, the Fifth Circuit's analysis for determining whether the state statute was divisible would still be good, since the statute in question appears to contain different elements, and not merely list different means of committing the same crime:
(1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:
(a) Deprive the other person of a right to the property or a benefit from the property.
(b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.
Fla. Stat. § 812.014 (2004) (416 F. App'x. at 381).

property in an embezzlement is done with the consent of the owner, albeit the consent is obtained by fraud.[674]

Again, practitioners are urged to consider carefully the statutes under which their clients are charged and to consult case law and other resources that will assist them in determining if this part of the aggravated felony statute will apply.

g. RICO Offenses.

Any offense listed under 18 U.S.C. § 1962 relating to Racketeer Influenced and Corrupt Organizations is an aggravated felony, provided that the maximum sentence **possible** is one year or more.[675] As with crimes of violence, this includes a number of crimes, and practitioners should become familiar with the types of crimes listed in 18 U.S.C. § 1962. Such offenses could include bankruptcy fraud, bribery, counterfeiting, extortion, wire and mail fraud, unlawful debt collection, and other crimes of the type described in the federal statute.

h. Failure to Appear.

If a criminal defendant commits the offense of failing to appear for service of a sentence, he or she commits an aggravated felony, ***provided that*** the underlying offense is punishable by imprisonment for a term of five years or more.[676] Additionally, if a person fails to appear before a court pursuant to a court order "to answer to or dispose of" a felony charge for which the possible punishment is two years or more, she or he has committed an aggravated felony.[677]

i. Attempts and Conspiracies.

Any attempt or conspiracy to commit any of the offenses defined as aggravated felonies is, in and of itself, an aggravated felony.[678]

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[674] *Mena v. Lynch*, 820 F.3d 114 (4th Cir. 2016).

[675] INA § 101(a)(43)(J), 8 U.S.C. § 1101(a)(43)(J).

[676] INA § 101(a)(43)(Q), 8 U.S.C. § 1101(a)(43)(Q).

[677] INA § 101(a)(43)(T), 8 U.S.C. § 1101(a)(43)(T).

[678] INA § 101(a)(43)(U), 8 U.S.C. § 1101(a)(43)(U).

7. Controlled Substance Offenses.

INA § 237(a)(2)(B)(i)[679] states that any non-citizen who has been convicted **any time after admission** of a violation (or a conspiracy or attempt to violate) any law or regulation of a State, of the United States, or of a foreign country relating to controlled substances is deportable. This ground of deportability reads very much like the ground of inadmissibility discussed above[680] with two exceptions. First, in order to make a non-citizen deportable, the controlled substance conviction must have occurred after admission into the U.S. Second, there is an exception to this ground of deportability for a single offense of simple possession of 30 grams or less of marijuana.[681]

INA § 237(a)(2)(B)(ii)[682] states that if, at any time after admission, a non-citizen is or has been a "drug abuser" or "addict," he or she is deportable. This ground of deportability is very similar to the related ground of inadmissibility[683] and will likely be interpreted in the same way.[684]

8. Firearms Offenses.

A non-citizen is deportable if, at any time after being admitted into the U.S., she or he is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing or carrying any weapon, part or accessory that falls under the definition of a firearm or destructive device, as those

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[679] 8 U.S.C. § 1227(a)(2)(B)(i).

[680] *See* section V.C.5., *supra*.

[681] One facing the issue of **inadmissibility** as the result of a controlled substance offense must affirmatively request a waiver if the conviction fits the "30 grams or less" simple possession category. In the deportation context, conviction of such an offense is a straight exception to the ground of deportability -- no affirmative request for relief from removal is necessary.

[682] 8 U.S.C. § 1227(a)(2)(B)(ii).

[683] INA § 212(a)(1)(A)(iv), 8 U.S.C. § 1182(a)(1)(A)(iv). *See* discussion in section V.C.2., *supra*.

[684] Most of the time, the ground of inadmissibility is interpreted by a consular officer of the State Department, who is evaluating the admissibility of a person attempting to enter the U.S. from abroad, whereas this ground of deportability will be interpreted by a DHS official here in the U.S. As a practical matter, however, DHS officials often look to State Department guidance on issues of inadmissibility when interpreting companion provisions of deportability.

definitions appear in 18 U.S.C. § 921(a)(3) and (4).[685] A conviction for attempting or conspiring to commit a firearm offense also renders one deportable.[686]

This ground of deportability should not be confused with the aggravated felony firearms offenses[687] -- it is much more inclusive. Although one convicted of a firearms offense that makes him deportable under this provision may also have been convicted of an aggravated felony trafficking offense, the two tests are not identical, and counsel should look closely at the two statutes to determine if both are implicated by a particular conviction.

If the person is charged with a crime that does not involve a firearm as an essential element of the offense, but receives an enhanced sentence because a firearm was involved, most courts hold that this is not a firearms offense for immigration purposes.[688]

In Nebraska, it appears as though any offense involving the definition of a "firearm" will **not** be a firearms offense for purposes of INA § 237(a)(2)(C) because the definition of "firearm" under the Nebraska statutes includes antique firearms, whereas the federal definition of "firearm" specifically excludes antique firearms.[689] Although it is incumbent upon a client to demonstrate that there is a realistic probability that a person could be prosecuted for possessing an antique firearm under the Nebraska statutes, the Nebraska Court of Appeals has affirmed the conviction of a person convicted of being a felon in possession of a firearm under Neb. Rev. Stat. § 28-1206 where the firearms he possessed were black

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[685] INA § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C).

[686] *Id*.

[687] INA § 101(a)(43)(C) and (E), 8 U.S.C. § 1101(a)(43)(C) and (E).

[688] *See, e.g.*, *Matter of Rodriguez-Cortes*, 20 I&N Dec. 587 (BIA 1992); *but see Vue v. I.N.S.*, 92 F.3d 696 (8th Cir. 1996) (holding that a conviction for aggravated robbery with a weapon did constitute a firearms offense where the record of conviction demonstrated that a firearm was used in the commission of the crime). It seems unlikely that this case would be decided the same way today, given the reinforced holdings of the categorical approach in cases such as *Descamps*, *Moncrieffe* and *Mathis*. Additionally, the client did not contest the government's use of the indictment during removal proceedings, which is the document from which it was determined that a weapon was involved.

[689] Compare the definition of "firearm" in Neb. Rev. Stat. § 1201(1) with the definition in 18 U.S.C. § 921(a).

powder pistols.[690] Such pistols are "antique firearms" under the federal definition.[691]

9. Domestic Violence Offenses.

There are two types of domestic violence offenses that make a non-citizen deportable: (1) conviction of certain "domestic violence" offenses and (2) violation of protection orders. Each of these offenses is discussed in turn below.[692]

If a non-citizen, after being admitted to the U.S., is convicted of a crime of domestic violence, stalking, child abuse, child neglect, or child abandonment, he or she is deportable.[693] The term "crime of domestic violence" means any crime of violence (as defined in 18 U.S.C. § 16)[694] committed against (1) a current or former spouse, (2) a person with whom the client shares a child in common, (3) a person with whom the client either is living or with whom the client once lived as a spouse, (4) a person "similarly situated" to a spouse under the laws of the jurisdiction where the crime is committed, or (5) a person who is protected from the client under the domestic or family violence laws of the United States, any state, any tribal government, or any unit of local government.[695]

There has been a significant amount of litigation concerning this deportation provision. As discussed earlier, the Supreme Court has weighed in with two significant decisions in this area: the *Castleman* and *Voisine* decisions.[696]

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[690] *State v. Tharp*, 22 Neb. App. 454, 854 N.W.2d 651 (2014), affirming the conviction of a person convicted of being a felon in possession of a firearm in violation of § 28-1206.

[691] 18 U.S.C. § 921(a)(16).

[692] It is important to note that this ground of deportability does not have a counterpart ground of inadmissibility under INA § 212, 8 U.S.C. § 1182. However, a domestic violence offense may also be considered as a crime involving moral turpitude (*see, e.g., Matter of Tran*, 21 I&N Dec. 291 (BIA 1996); *but see Matter of Sanudo*, 23 I&N Dec. 968 (2006), limiting the *Tran analysis)*, or may be considered some other type of inadmissible or deportable offense, depending on the facts of the case.

[693] INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i).

[694] In light of the *Dimaya* opinion holding subsection (b) of 18 U.S.C. § 16 to be unconstitutionally vague, one only need be concerned with whether the offense fits the definition of "crime of violence" under subsection (a).

[695] *Id*.

[696] *See* section V.D.6.d., *supra*, for a discussion of *Castleman* and *Voisine*.

In 2006, the BIA issued an important decision interpreting this ground of deportability. In *Matter of Sanudo*,[697] the BIA held that a non-citizen's conviction for domestic battery in violation of California law was not categorically a "crime of violence" and therefore the § 237(a)(2)(E)(i) ground of deportability did not apply.[698] Other decisions have followed this same analysis.[699] Given the decision in *Johnson v. United States*,[700] there is a good argument that any statute under which a conviction can be obtained without a showing of at least bodily injury is not a "crime of violence."[701]

There is also a very good argument that, under certain statutes, a crime of violence is not involved even if there is bodily injury present. In a 2018 order (on file with the author), Judge Anderson of the Omaha Immigration Court held that conviction under Neb. Rev. Stat. § 28-310(1) (third degree assault – intentionally, knowingly or recklessly causing bodily injury to a domestic partner) is not a crime of domestic violence because, under the categorical approach, the statute is indivisible, and recklessness is not a sufficient level of scienter to support a finding that the statute is a crime of violence.[702]

The Board of Immigration Appeals issued a significant decision in 2016 interpreting this deportability provision. In *Matter of H. Estrada*,[703] the BIA

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[697] 23 I&N Dec. 968 (BIA 2006).

[698] *Sanudo* also held that violation of this California statute did not constitute a "crime involving moral turpitude" under § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii), because under California law, a conviction could be sustained for a very minor and incidental unconsented-to touching of the victim, not necessarily involving any violence or tangible harm. *Id*. at 972.

[699] *See, e.g., Bhan v. Gonzalez*, 198 F. App'x 604 (9th Cir. 2006) (holding that conviction under a Washington fourth degree assault statute was not a "crime of violence," and therefore not a "domestic violence offense," because the statute can be violated by mere touching or spitting); *Matter of Sejas*, 24 I&N Dec. 236 (BIA 2007) (holding the same way, and for the same reasons, with respect to a Virginia statute).

[700] 559 U.S. 133 (2010).

[701] In fact, a local immigration practitioner has reported to us that she was able to convince an Immigration Judge that a conviction of her client under Neb. Rev. Stat. § 28-323 for domestic assault was not a "crime of violence" and therefore did not render her client deportable under § 237(a)(2)(E)(I).

[702] This decision is obviously bolstered by the Supreme Court's decision in *Borden v. United States*. *See* section V.D.6.e.(1), *supra*.

[703] 26 I&N Dec. 749 (BIA 2016).

held that the circumstance-specific approach as set forth by the U.S. Supreme Court in the *Nijhawan* case,[704] rather than a strict categorical approach as articulated by *Descamps*,[705] was the appropriate method to use to determine whether the assault crime of which the respondent was convicted was committed against a person who qualifies as a domestic partner. And, of course, there is the *Voisine* decision[706] that reinforces this circumstance-specific approach in such cases.

The INA also renders deportable any non-citizen who violates a protection order issued against that person.[707] A "protection order" includes not only free-standing proceedings, such as those under Nebraska's Protection From Domestic Abuse Act,[708] but also temporary orders entered ancillary to other proceedings, such as the types of temporary orders that may be entered in conjunction with dissolution or legal separation actions.[709] Understand that even if the client is not convicted of a criminal offense for violating the protection order, she or he could still be deportable: even a finding of civil contempt would satisfy the provisions of this part of the statute.[710]

10. Terrorist Activity.

This ground of deportability[711] is defined, and interpreted, exactly the same as the corresponding ground of inadmissibility.[712]

11. Miscellaneous Grounds of Deportability.

The foregoing subsections are not an exhaustive list of all grounds of deportability. As with the case of the numerous grounds of inadmissibility, other

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[704] *See* the discussion of *Nijhawan* in section V.C.3.b.(6), *supra*.

[705] *See* the discussion of *Descamps* in section V.C.3.b.(8), *supra*.

[706] *See* section V.D.6.d.(5), *supra*.

[707] INA § 237(a)(3)(E)(ii), 8 U.S.C. § 1227(a)(2)(E)(ii).

[708] Neb. Rev. Stat. §§ 42-901 to 42-929.

[709] Neb. Rev. Stat. § 42-357.

[710] *See, e.g., Diaz-Quirazco v. Barr*, 931 F.3d 830 (9th Cir. 2019).

[711] INA § 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B).

[712] INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B). *See* section V.C.9., *supra*., for a discussion of this ground of inadmissibility.

grounds of deportability exist. They relate to crimes such as espionage,[713] sabotage,[714] treason,[715] sedition,[716] failure to comply with Selective Service laws,[717] document fraud,[718] and unlawful voting.[719] All grounds of deportability are found in INA § 237, 8 U.S.C. § 1227, and practitioners are urged to consult that section of the INA when determining whether their non-citizen client is charged with a crime that carries deportation consequences.

E. "Inchoate" Immigration Offenses.

There are some offenses that, although they do not have any immediate inadmissibility or deportation consequences, can make a non-citizen client's life miserable in the future. For example, clients who engage in certain acts are ineligible to receive some types of relief from deportation or waivers of inadmissibility. As such, criminal law practitioners should have some familiarity with these "inchoate" immigration offenses in order to try to avoid admissions or convictions that will have future collateral effects on a client's immigration options.

1. Lack of Good Moral Character.

In order to be eligible to receive certain benefits under the INA, a non-citizen must demonstrate that she or he is of "good moral character."[720] That term is defined in the INA[721] by listing acts which, if committed by a non-citizen, will preclude him or her from demonstrating "good moral character."

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[713] INA § 237(a)(2)(D)(i), 8 U.S.C. § 1227(a)(2)(D)(i).

[714] *Id*.

[715] *Id*.

[716] *Id*.

[717] INA § 237(a)(2)(D)(iii), 8 U.S.C. § 1227(a)(2)(D)(iii).

[718] INA § 237(a)(3)(B) and (C), 8 U.S.C. § 1227(a)(3)(B) and (C).

[719] INA § 237(a)(6), 8 U.S.C. § 1227(a)(6).

[720] Some of the instances in which a demonstration of good moral character is required include naturalization (an application to become a U.S. citizen), voluntary departure (an application that, if granted, allows one to leave the U.S. voluntarily in lieu of being removed under an order of removal), and cancellation of removal (a form of an affirmative defense to removal available to certain non-citizens). Other programs, such as eligibility for benefits under the Nicaraguan and Central American Relief Act (NACARA) or the Temporary Protected Status (TPS) program (*see* section III.I.1., *supra*) also require a showing of good moral character.

[721] INA § 101(f), 8 U.S.C. § 1101(f).

One is precluded from establishing that she or he is of "good moral character" if:

• He or she is or was a "habitual drunkard."[722]

• She or he commits an offense that places him or her in a class of persons described by INA §§ 212(a)(2)(A)[723] (relating to crimes involving moral turpitude or controlled substance violations), (a)(2)(B)[724] (relating to multiple criminal convictions), (a)(2)(C)[725] (relating to controlled substance traffickers), (a)(2)(D)[726] (relating to engaging in prostitution or commercialized vice), (a)(6)(E)[727] (relating to alien smuggling), or 212(a)(9)(A)[728] (relating to entry into the U.S. after previously having been removed).[729] A person cannot demonstrate good moral character if she or he falls in the above-described class of people ***even if***, under those sections, the person would not be inadmissible.[730]

• His or her income is derived principally from illegal gambling or he or she has been convicted of two or more gambling offenses.[731]

• He or she has given false testimony for purposes of receiving any immigration benefit.[732]

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[722] INA § 101(f)(1), 8 U.S.C. § 1101(f)(1).

[723] 8 U.S.C. § 1182(a)(2)(A).

[724] 8 U.S.C. § 1182(a)(2)(B).

[725] 8 U.S.C. § 1182(a)(2)(C).

[726] 8 U.S.C. § 1182(a)(2)(D).

[727] 8 U.S.C. § 1182(a)(6)(E).

[728] 8 U.S.C. § 1182(a)(9)(A).

[729] INA § 101(f)(3), 8 U.S.C. § 1101(f)(3).

[730] *Id*. There is one notable exception to this, however. If an individual is convicted of, admits having committed, or admits committing acts constituting the essential elements of a crime involving moral turpitude (*see* section V.C.3., *supra*.), **and** if the "petty offense" exception applies (*see* INA § 212(a)(2)(A)(ii)(II), 8 U.S.C. § 1182(a)(2)(A)(ii)(II) *and also see* section V.C.3.d.(2)), then the person is not precluded from showing good moral character. *Matter of Urpi-Sancho*, 12 I&N Dec. 147 (BIA 1956).

[731] INA § 101(f)(4) and (5), 8 U.S.C. § 1101(f)(4) and (5).

[732] INA § 101(f)(6), 8 U.S.C. § 1101(f)(6). *See Matter of Richmond*, 26 I&N Dec. 779

• He or she has been confined, as a result of a conviction, to a penal institution for an aggregate period of 180 days or more, even if the confinement was the result of crimes committed outside the period for which he or she must demonstrate good moral character.[733]

• He or she has been convicted of an aggravated felony.[734]

Some immigration benefits require one to demonstrate affirmatively that she or he is of good moral character. Other benefits are "discretionary" in nature, meaning that an immigration official can refuse to confer the benefit on a non-citizen if, in the official's exercise of discretion, that person does not deserve a favorable exercise of discretion.[735] In deciding whether or not to exercise discretion in favor of an individual, immigration officials frequently look at the "good moral character" test, even though it is not always a categorical precondition to the granting of the benefit.

It is important to understand that just because one has avoided committing the acts that would require a finding that she or he is not of "good moral character," this does not mean that the person has "good moral character."[736] It simply means that the person is not categorically barred from demonstrating that he or she is, in fact, of good moral character.

However, if the person either (1) makes a false claim to U.S. citizenship or (2) registers to vote or actually votes in an election at any level in violation of a law requiring voters to be U.S. citizens, she or he can still be found to be of good moral character. In order for this exception to apply, the person must show the following: both his or her parents are U.S. citizens, she or he resided

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(BIA 2016) for a case interpreting this provision.

[733] INA § 101(f)(7), 8 U.S.C. § 1101(f)(7).

[734] INA § 101(f)(8), 8 U.S.C. § 1101(f)(8). *See* section V.D.6., *supra*, for a discussion of aggravated felonies. To qualify as an "aggravated felony," a conviction for a qualifying criminal offense must have occurred after November 29, 1990, unless the crime is murder, in which case the date of the conviction is irrelevant. *See* §§ 501(b) and 509, Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (Nov. 29, 1990). *See also Caastiglia v. I.N.S.*, 108 F.3d 1101, 1103-1104 (9th Cir. 1997).

[735] Examples of such benefits are adjustment of status, asylum and cancellation of removal.

[736] *See* the last paragraph of INA § 101(f), 8 U.S.C. § 1101(f).

permanently in the U.S. before reaching age 16, and he or she reasonably believed at the time of making the claim that he or she was, in fact, a U.S. citizen.[737]

In the documents related to a criminal proceeding, it would be helpful to try to delete any references to any of the acts listed in the statute since some of those acts do not require a conviction to bar one from demonstrating good moral character. Unless the statute specifically requires otherwise, mere commission of the listed acts can bar one from establishing good moral character, even if she or he was not convicted of a crime relating to the commission of such acts.

2. Particularly Serious Crimes.

One who (1) has been convicted by a final judgment of a "particularly serious crime," or (2) who USCIS or ICE has "serious reasons" for believing has committed a "particularly serious crime" is ineligible to apply for either asylum[738] or withholding of removal.[739] As to (1), the statutes actually read that a non-citizen is ineligible for these immigration benefits if "the alien, having been convicted of a particularly serious crime is a danger to the community of the United States." Although this sounds like a two-pronged test (conviction of a particularly serious crime + being a danger to the United States), the BIA has held that it is not, and that one who has been convicted of a "particularly serious crime" is *per se* a danger to the United States.[740] Most federal courts have agreed with that interpretation, including the Eighth Circuit.[741] The Eighth Circuit has

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[737] *Id*.

[738] INA § 208(b)(2)(A)(ii) and (iii), 8 U.S.C. § 1158(b)(2)(A)(ii) and (iii). Former Attorney General Ashcroft held that he was "highly disinclined" to exercise his discretion to grant asylum where the non-citizen has been convicted of a dangerous or violent crime unless extraordinary circumstances exist. *Matter of Jean*, 23 I&N Dec. 373 (AG 2002). The respondent in *Jean* was convicted of second degree manslaughter under New York law relating to the death of an infant.

[739] INA § 241(b)(3)(B)(ii) and (iii), 8 U.S.C. § 1231(b)(3)(B)(ii) and (iii). Withholding of removal is a benefit that is similar in nature to asylum, except that it is strictly an affirmative defense to a removal proceeding. Additionally, unlike an application for asylum, withholding of removal is a non-discretionary form of relief, which means that if the person meets all of the elements entitling him or her to withholding of removal, an immigration official must grant the relief, whether or not the official deems the individual "worthy" of the relief.

[740] *Matter of Carballe*, 19 I&N Dec. 357 (BIA 1986).

[741] *See, e.g., Tian v. Holder*, 576 F.3d 890 (8th Cir. 2009).

held that the "serious reason for believing" test under (2) above equates to a finding of probable cause, rather than a lower standard of "some evidence."[742]

The term "particularly serious crime" is partially defined in statute. For purposes of an asylum claim, one who has been convicted of an aggravated felony[743] has been convicted of a "particularly serious crime."[744] For purposes of asserting a withholding of removal claim, one has been convicted of a "particularly serious crime" if he or she is convicted of an aggravated felony **and** has, in connection with such conviction(s), been sentenced to an aggregate term of imprisonment of at least five years.[745] The withholding statute makes clear that aggravated felonies are not the only types of crimes that can constitute "particularly serious crimes."[746]

Although "particularly serious crime" is partially defined by the statutes, its complete definition has been left to administrative tribunals and the courts. Whether a crime that is not an aggravated felony is "particularly serious" is determined on a case-by-case basis. The Board of Immigration Appeals has given some guidance on the factors it considers in determining whether a crime is "particularly serious." It looks at the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and whether the type and circumstances of the crime indicate that the person likely will be a danger to society.[747]

The Eighth Circuit has held that evidence of a defendant's mental health at the time the crime was committed should be considered by the Immigration Court and the BIA when deciding whether a crime is "particularly serious."[748] Given the holding in *Shazi*, if it is otherwise consistent with the goals of the client in a criminal case, criminal defense counsel should consider presenting mental health evidence in criminal court (if nothing else, as part of the sentencing process) for cases in which a conviction might otherwise be considered to be a particularly serious crime. Such "ready made" evidence in the criminal record would be of

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[742] *Barahona v. Garland*, 993 F.3d 1024 (8th Cir. 2021).

[743] For a detailed discussion of aggravated felonies, *see* section V.D.6., *supra*.

[744] INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i).

[745] INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B).

[746] *Id*.

[747] *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1992). *Matter of N-A-M*, 24 I&N Dec. 336 (BIA 2007).

[748] *Shazi v. Wilkinson*, 988 F.3d 441 (8th Cir. 2021).

assistance to immigration counsel who may seek to argue that such evidence should be considered by immigration decision-makers addressing the issue of whether a conviction was for a particularly serious crime.

It is difficult to paint with any broad strokes in this area, but, generally speaking, crimes against persons are more likely to be considered particularly serious crimes than property crimes.[749] Robbery with a firearm,[750] drug trafficking crimes,[751] mail fraud crimes involving substantial amounts of money,[752] and possession of child pornography[753] have been held to be particularly serious crimes. Burglary with intent to commit theft[754] and simple possession of cocaine[755] have been held **not** to be particularly serious crimes. The Ninth Circuit has held that it is at least possible that a serious DWI offense, or multiple DWI offenses, might be particularly serious crimes.[756]

Practitioners should also remember, however, that given the wide number of crimes that now are categorized as aggravated felonies, there are many non-violent crimes that will, by statutory definition, be considered to be particularly serious crimes.

3. Significant Misdemeanors.

Non-citizens who have been granted Deferred Action for Childhood Arrivals (DACA) relief will lose their eligibility for DACA if they are convicted of a "significant misdemeanor" or three or more "non-significant" misdemeanors.[757]

A "significant misdemeanor," for DACA purposes, is defined as one that is a misdemeanor under federal law (i.e., one that carries a possible penalty of imprisonment of more than five days up to one year), and either (1) is an offense

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749 *Id*.

750 *Matter of Carballe*, 19 I&N Dec. 357 (BIA 1986).

751 *Matter of Y-L-, A-G-, R-S-R-*, 23 I&N Dec. 270 (AG 2002).

752 *Arbid v. Holder*, 674 F.3d 1138 (9th Cir. 2012); *Tian,* 546 F.3d 890.

753 *Matter of R-A-*, 25 I&N Dec. 657 (BIA 2012).

754 *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982).

755 *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (AG 1994).

756 *Delgado v. Holder*, 648 F.3d 1095 (9th Cir. 2011).

757 For a more complete discussion of the DACA program, see section III.I.3.a., *supra*.

of domestic violence, sexual abuse or exploitation, burglary, unlawful possession or use of a firearm, drug distribution or trafficking, or driving under the influence or (2) is one for which the individual was sentenced to time in custody of more than 90 days. The sentence must involve time to be served in custody, and therefore does not include a suspended sentence.[758]

A "non-significant misdemeanor" for DACA purposes is a misdemeanor as defined under federal law (i.e., one that carries a possible penalty of imprisonment of more than 5 days up to a year), other than an offense of domestic violence, sexual abuse or exploitation, burglary, unlawful possession or use of a firearm, drug distribution or trafficking, or driving under the influence and is one for which the individual was sentenced to time in custody of 90 days or less.[759]

VI. WAIVERS OF INADMISSIBILITY AND RELIEF FROM REMOVAL.

As discussed earlier,[760] the Nebraska Supreme Court has implicitly held that *Padilla* requires criminal defense counsel to advise their clients if a particular conviction will imperil any forms of relief from removal to which they might otherwise be entitled. Rather than add another category to each of the statutory analysis charts, I discuss here the most common forms of waivers of inadmissibility and relief from removal for which clients may be eligible. For each form of waiver or relief from removal, I have (1) set forth the elements the client must prove to qualify and (2) indicated what types of criminal offenses will categorically bar the client from qualifying for that particular waiver or relief.

In order to help you advise your clients fully of the possible immigration consequences they face as the result of criminal proceedings, I have developed flow charts for each form of waiver of inadmissibility and relief from removal discussed here. Those flow charts appear in **Attachment 3**. If conviction of the crime in question would imperil a waiver or form of relief to which the client might otherwise be entitled, make certain to advise the client accordingly as part of your *Padilla* responsibilities.

A. Introduction.

Just as it is important to determine whether your client should be concerned with inadmissibility, deportability, or both, it is important to understand the basic terminology regarding waivers of inadmissibility and relief from removal.

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[758] U.S.C.I.S., *Consideration of Deferred Action for Childhood Arrivals*, https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca (last visited June 17, 2021).

[759] *Id*.

[760] *See* the discussion of *State v. Gonzalez* in section I.D.2.c.(4)(a), *supra*.

Generally speaking, if your client is concerned about whether he or she will be inadmissible to the United States as the result of a criminal proceeding, you need to analyze whether there are any waivers of the particular ground of inadmissibility with which your client is concerned and, if so, whether the criminal proceedings in which your client is involved might imperil his or her opportunity to apply for such waivers. On the other hand, if deportability is the main concern for your client, then you need to determine which forms of relief from removal might be available to your client, and whether the criminal proceedings in which your client is involved might jeopardize such relief.

Following is a brief overview and discussion of some of the more common types of waivers of inadmissibility and relief from removal. Only the most common forms of waivers and relief from removal are discussed here. For a more thorough discussion, refer to various of the resources discussed in section I.E., *supra*.

1. Section 212(h) Waivers for Certain Grounds of Inadmissibility Related to Crimes.

The main waiver of inadmissibility available to non-citizens who are charged with or have been convicted of crimes is found in Section 212(h) of the Immigration and Nationality Act.[761] If your client is concerned that a criminal proceeding might make him or her inadmissible to the United States, you will need to look carefully at the provisions of § 212(h) to determine if your client might be eligible for a waiver of grounds of inadmissibility and, if so, whether you can do anything during the course of the criminal case to preserve the availability of the § 212(h) waiver to your client.

Think of waivers of inadmissibility as akin to pardons for past offenses. In other words, a waiver is granted to a client who would otherwise be inadmissible to the United States if (1) the client is categorically eligible for the waiver and (2) the federal authorities in charge of adjudicating the waiver application decide to exercise discretion in the client's favor and grant the waiver application.

This is an important point about waivers: all of them are what Homeland Security and Department of State officials call "discretionary" benefits. What that means, as a practical matter, is that even if an individual is categorically qualified for the waiver, the decision-maker can decide, in the exercise of discretion, not to approve the waiver application. Therefore, while your main focus as a criminal defense lawyer is to preserve the client's categorical eligibility for a waiver, you should, if possible, also emphasize any positive equities your client has during the making of what immigration authorities call the record of conviction: the information (or indictment), plea (or trial), judgment (or verdict), and sentence. Favorable comments, findings or evidence in any of these documents does have

[761] 8 U.S.C. § 1182(h).

an impact on immigration decision-makers, and will be a big help to your client when it comes time to apply for the waiver.

a. Elements of Section 212(h) Waiver.

(1) Grounds of Inadmissibility That Can be Waived.

A § 212(h) waiver is available to waive the following grounds of inadmissibility:

(1) Crimes involving moral turpitude;[762]

(2) A single controlled substance offense relating to possession of marijuana of 30 grams or less;[763]

(3) Multiple criminal convictions where the aggregate sentences to confinement imposed were five years or more;[764]

(4) Prostitution or commercialized vice crimes;[765] and

(5) Certain non-citizens who are eligible for immunity from prosecution.[766]

No other criminal grounds of inadmissibility can be waived by virtue of a § 212(h) waiver.

(2) Those Eligible to Apply for a § 212(h) Waiver.

(a) Non-Lawful Permanent Residents.

The following non-LPRs are eligible to apply for a § 212(h) waiver:

(1) Those who have a U.S. citizen or lawful permanent resident parent, spouse, son or daughter who will suffer

[762] 8 U.S.C. § 1182(a)(2)(A)(i)(I).

[763] 8 U.S.C. § 1182(a)(2)(A)(i)(II).

[764] 8 U.S.C. § 1182(a)(2)(B).

[765] 8 U.S.C. § 1182(a)(2)(D).

[766] 8 U.S.C. § 1182(a)(2)(E).

"extreme hardship" if the waiver is not granted to the person.[767]

(2) Those who are inadmissible as the result of prostitution or commercialized vice crimes if:

> (a) The activities for which the person is inadmissible occurred more than 15 years before his or her application for admission;
>
> (b) The person's admission to the United States would not be contrary to the national welfare, safety, or security of the United States; and
>
> (c) The person has been rehabilitated.[768]

(3) The spouses or children of one who qualify as victims of domestic violence under the VAWA provisions of the INA, meaning that they have been abused by their U.S. citizen or LPR spouse or parent.[769]

(b) Lawful Permanent Residents.

Although the § 212(h) waiver is most often applied for by those who have not yet obtained permanent status in the United States, it is sometimes applied for by lawful permanent residents (green card holders) if inadmissibility is an issue for them.[770] Ironically, the § 212(h) waiver is more difficult to get for LPRs than it is for non-LPRs. LPRs are eligible to apply for a § 212(h) waiver if:

(1) They have not been convicted of an aggravated felony and

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[767] 8 U.S.C. § 1182(h)(1)(B).

[768] 8 U.S.C. § 1182(h)(1)(A).

[769] 8 U.S.C. § 1182(h)(1)(C).

[770] *See* section V.B.1.c, *supra*, for a discussion of when lawful permanent residents need to be concerned with inadmissibility.

(2) They have had lawful continuous residence in the United States for a period of at least seven years before the initiation of removal proceedings against them.[771]

b. A Quick Checklist to Screen for Possible § 212(h) Waiver Eligibility.

Following is a text checklist that will help you determine if your client might be eligible for a § 212(h) waiver. A flow chart to help determine eligibility is found at **Attachment 3**.

(1) Is inadmissibility an issue for your client?

(2) If so, is the crime with which your client is charged one of the crimes eligible for a § 212(h) waiver?

(3) If so, is your client either (1) a non-LPR with a qualifying family member *or* (2) an LPR who has not been convicted of an aggravated felony and who has been in the U.S. continuously in lawful status for at least seven years?

c. Preserving Eligibility for a § 212(h) Waiver.

If your client is potentially eligible for a § 212(h) waiver, you should try to preserve your client's eligibility for the waiver. Some ways in which you could do this include:

(1) If your client has been charged with a crime that is not one eligible for a § 212(h) waiver, you should attempt to negotiate for a charge that is eligible for a waiver.

(2) If the client has positive equities, try to have those reflected in any documents constituting the Record of Conviction.

(3) In general, a § 212(h) waiver will not be granted for those convicted of violent or dangerous crimes,[772] so if your client is charged with such a crime, you should try to negotiate a plea in which your client pleads to a non-violent offense.

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[771] 8 U.S.C. § 1182(h) (last full paragraph).

[772] *See, e.g., In re Jean*, 23 I&N Dec. 373 (AG 2002), denying a waiver in the exercise of discretion for a refugee seeking to become an LPR because she was convicted of second degree manslaughter in the death of her toddler relative.

2. Cancellation of Removal for Non-Permanent Residents.

Certain individuals who are undocumented, and who are in removal proceedings, can apply for a form of relief from removal referred to as "non-LPR cancellation." This form of relief from removal is akin to an affirmative defense to the removal proceeding. The client must affirmatively apply for the relief, and carry the burden of proof to establish eligibility for the relief. But the payoff for an undocumented individual is huge: if the cancellation application is approved, the person becomes a lawful permanent resident (i.e., gets his or her green card). The statutory provisions regarding non-LPR cancellation are found at INA § 240A(b).[773]

Pereida v. Wilkinson.[774] In 2021, the Supreme Court issued an important decision regarding non-LPR cancellation of removal. In *Pereida*, the Supreme Court held that non-LPR cancellation applicants bear the burden of proof to demonstrate that they were not convicted of any disqualifying crimes in order to qualify for non-LPR cancellation. Here is a summary of the case.

Mr. Pereida was an undocumented client who was placed in removal proceedings. He applied for non-LPR cancellation of removal. Because he had been convicted of attempted criminal impersonation under Neb. Rev. Stat. § 28-638, there was a question about his eligibility for non-LPR cancellation; more specifically, the issue was whether his conviction was a crime involving moral turpitude (CIMT), which would disqualify him from receiving non-LPR cancellation.[775] The lower courts found that § 28-638 was a divisible statute, with some sections describing CIMTs and some sections not.[776]

This presented the parties with a dilemma because, although the government introduced a complaint of the information charging Mr. Pereida with a violation of § 28-638(a) for using a fraudulent Social Security card for the purposes of obtaining employment, there was no evidence in the record as to which section of the statute of which Mr. Pereida was actually convicted. Mr. Pereida argued that, under the categorical approach as it relates to divisible statutes,[777] it must be

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[773] 8 U.S.C. § 1229b(b).

[774] *Pereida v. Wilkinson*, ___ U.S. ___, 141 S.Ct. 754, 209 L.Ed.2d 47 (2021).

[775] INA § 240A(b)(1)(C), 8 U.S.C. § 1229b(b)(1)(C).

[776] More specifically, the courts, including the Supreme Court, agreed that a conviction for violating § 28-638(c) – carrying on any profession, business, or any other occupation without a license, certificate, or other authorization required by law – would not constitute a CIMT.

[777] *See* section V.C.3.b., *supra*.

assumed that he was convicted of the least culpable conduct necessary to sustain a conviction under § 28-638, which would not be a CIMT.

Ultimately, that position did not prevail. The Supreme Court held that, in the context of an application for non-LPR cancellation, which is a form of relief from removal, the non-citizen client carries the burden of proof on all aspects of the case, including demonstrating that he was not convicted of a disqualifying offense. In the context of an application for relief from removal, the Court held, the non-citizen cannot simply rely on the categorical approach to shift the burden of proof to the government to show that he or she was convicted of a disqualifying offense – he or she must affirmatively demonstrate, as part of carrying the burden of proof, that he or she was not convicted of a disqualifying offense.

This obviously puts criminal defense counsel on the horns of a dilemma in deciding what strategy to employ during state court criminal proceedings. In the case of a divisible statute containing both removable and non-removable offenses, it would be to the non-citizen's advantage for the record of conviction to be silent as to which part of a divisible statute was involved in cases in which the government carries the burden of proof. On the other hand, in cases involving applications for relief from removal, it is to the non-citizen's advantage to, if possible, have the record of conviction specify that the client was convicted of a non-removal part of the divisible statute. So how is criminal defense counsel to resolve this dilemma? There is no one-size-fits-all answer to this question, because the strategy will vary in each case, depending on the facts and circumstances.

Suppose that you represent a client who is charged with, and likely to be convicted of, violation of one section of a divisible statute, some parts of which involve removable offenses and at least one part of which involves a non-removable offense. If the specific offense involved is, in fact, a removable offense, and if the only issue on the immigration side of things is whether the client is removable, then keeping the record of conviction ambiguous is the best approach, since the government carries the burden of proof to show that the client is removable and, absent some specificity in the record of conviction, the categorical approach assumes that the client was convicted of the least culpable offense necessary to sustain a conviction – in this hypothetical case, a non-removable offense.

However, suppose you represent another client, charged under the same statute, but this client is eligible for some form of relief from removal that requires the client to demonstrate that they have not been convicted of a disqualifying offense. In such a case, the best strategy would be to have the record of conviction specify the part of the divisible statute of which the client was convicted (provided that the specific part of the statute involved a non-disqualifying offense).

In short, the default criminal defense strategy, post-*Pereida*, is to have the record of conviction specify the portion of a divisible statute of which the client was convicted, provided the client was convicted of the portion of a divisible statute that carries no adverse immigration consequences. On the other hand, if the client is charged with a portion of a divisible statute that carries adverse immigration consequences, then the best strategy is to leave or make the record of conviction vague because, at least in the first instance (proving removability), the government carries the burden of proof.

Let's consider application of this strategy under the facts of *Pereida*, since it involved a conviction of a Nebraska criminal statute, Neb. Rev. Stat. § 28-638. It is apparent from the strategy adopted by Mr. Pereida's counsel that he was likely charged with, and convicted of, a portion of the divisible statute that was a CIMT.[778] In such a case, keeping the record of conviction vague would be a good strategy in terms of make the government prove removability. The problem with that strategy, in the context of the facts of this case, is that the government didn't need to rely on a conviction to show that Mr. Pereida was removable – he was removable because he was present in the country without documentation. In such cases, the easiest way for the government to prove up removability is simply to charge the non-citizen with being removable under INA § 212(a)(6)(A)(i)[779] – someone present in the United States who has not been admitted or paroled into the country. At that point, the only way to keep Mr. Pereida in the country is to find some form of relief from removability – in this case, non-LPR cancellation. But now the strategy becomes very different. Since Mr. Pereida carries the burden of proof in the context of an application for relief from removal, he needs to show that he was not convicted of a CIMT. And the only way to do that in the context of a divisible statute, is to have the record of conviction clearly reflect that he was convicted of the portion of the divisible statute that did not constitute a CIMT.[780]

Although *Pereida*, doesn't, as a practical matter, change the strategy considerations that preceded the opinion,[781] it does re-emphasize the importance both of understanding how the categorical approach works in the immigration

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[778] Most probably, § 28-638(1)(a).

[779] 8 U.S.C. § 1182(a)(6)(A)(i).

[780] Of course, this is not always possible. If, in fact, the client is convicted of a CIMT, then no amount of subterfuge will help someone in Mr. Pereira's situation – he is simply not eligible for non-LPR cancellation relief. That is, in all likelihood, what happened in Mr. Pereira's case.

[781] Most courts, including the Eighth Circuit, had reached the same result as the Supreme Court did in *Pereida*.

context and identifying a non-citizen client's situation as soon as practicable in a criminal case so that the best strategy can be pursued.

a. Elements of "Regular" Non-LPR Cancellation.

In order to be eligible to apply for non-LPR cancellation, a client must meet the following requirements:

(1) He or she must have been physically present in the United States for a continuous period of at least 10 years. The period of physical presence begins when the client first physically enters the United States, even if such physical entry is without documentation. The client stops accruing physical presence for purposes of non-LPR cancellation at the earliest of the following times:

(a) He or she is served with a document placing him or her in removal proceedings (a Notice to Appear); or

(b) He or she commits an offense listed in INA §§ 212(a)(2),[782] 237(a)(2),[783] or 237(a)(4).[784]

(2) He or she must have been a person of "good moral character"[785] during the period of physical presence in the United States.

(3) He or she must show that his removal from the United States would result in exceptional and extremely unusual hardship to his or her U.S. citizen or LPR spouse, parent or child.

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[782] 8 U.S.C. § 1182(a)(2).

[783] 8 U.S.C. § 1227(a)(2).

[784] 8 U.S.C. § 1227(a)(4). Thus, even though an undocumented client's primary issue is inadmissibility, rather than deportability, if your client is eligible for non-LPR cancellation, you should try to avoid having the client convicted of an offense listed in § 237(a)(2). As an example, suppose you represent an undocumented client who is charged with a firearms offense. Such an offense is not a ground of inadmissibility under § 212(a)(2) of the INA. However, if your undocumented client is potentially eligible for non-LPR cancellation, you should try to avoid a deportable firearms conviction even though such a conviction, in and of itself will not subject the client to removal proceedings, because such a conviction would categorically bar your client from applying for non-LPR cancellation.

[785] 8 U.S.C. § 1101(f).

(4) He or she is not inadmissible or deportable as a "terrorist" under INA §§ 212(a)(3)[786] or 237(a)(4).[787]

(5) He or she has not previously been granted non-LPR cancellation or suspension of deportation, which was the name of non-LPR cancellation before 1996.

b. A Quick Checklist to Screen for Possible Non-LPR Cancellation Eligibility.

Following is a text checklist that will help you determine if your client might be eligible for non-LPR cancellation of removal. A flow chart to help determine eligibility is found at **Attachment 3**.

(1) Is your client undocumented?

(2) If so, has he or she been physically present in the U.S. for a continuous period of at least 10 years before being placed in removal proceedings?

(3) If so, is his or her criminal record clean in the sense that he or she has not previously committed a criminal offense that is described in § 1182(a)(2) (criminal grounds of inadmissibility), § 1227(a)(2) (criminal grounds of deportability), or § 1227(a)(4) (terrorist grounds of deportability) before accruing 10 years of physical presence?

(4) If so, does your client have a U.S. citizen or LPR spouse, parent or child?

c. Preserving Non-LPR Cancellation Eligibility.

If your client is potentially eligible for non-LPR cancellation, you should try to preserve your client's eligibility for cancellation. Some ways in which you might do this include:

(1) Avoid convictions for any of the offenses described in the sections of 8 U.S.C. set forth above; and

(2) Avoid convictions of any offenses that would fall under 8 U.S.C. §1101(f), which would preclude the client from demonstrating good moral character.

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[786] 8 U.S.C. § 1182(a)(3).

[787] 8 U.S.C. § 1227(a)(4).

d. Elements of Non-LPR Cancellation for Victims of Domestic Violence.

In order to be eligible to apply for non-LPR cancellation, a client who is a victim of domestic violence must meet the following requirements:

(1) He or she must fall into one of the following classes:

(a) He or she is the spouse of a U.S. citizen or LPR and has been battered or subjected to extreme cruelty by the abusive spouse;[788]

(b) He or she is the son or daughter of a U.S. citizen or LPR and has been battered or subjected to extreme cruelty by the abusive parent;[789]

(c) He or she is the parent of a child[790] who was battered or subjected to extreme cruelty by the child's U.S. citizen or LPR parent, even if s/he is not married to the abused child's abusive parent;[791]

(d) He or she was battered or subject to extreme cruelty by a U.S. citizen or LPR s/he intended to marry, but the marriage was not legitimate because of the abuser's bigamy.[792]

(2) He or she must have been physically present in the United States for a continuous period of not less than three years immediately preceding the date of the application for cancellation of removal;[793]

(3) He or she has been a person of good moral character[794] during the time of his or her physical presence in the U.S.;[795]

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[788] 8 U.S.C. § 1229b(b)(2)(A)(i)(I) and (II).

[789] *Id*.

[790] "Child" is defined in 8 U.S.C. § 1101(b) to mean someone who is single and under the age of 21.

[791] 8 U.S.C. § 1229b(b)(2)(A)(i)(II).

[792] 8 U.S.C. § 1229b(b)(2)(A)(i)(III).

[793] 8 U.S.C. § 1229b(b)(2)(A)(ii). Issuance of a Notice to Appear (the charging document placing someone in removal proceedings) will not "stop the clock" on the accrual of the three-year residency requirement, as it would in "regular" non-LPR cancellation cases.

[794] *See* 8 U.S.C. § 1101(f).

[795] 8 U.S.C. § 1229b(b)(2)(A)(iii).

(4) He or she is not:

(a) Inadmissible under 8 U.S.C. §§ 1182(a)(2) (criminal grounds of inadmissibility) or 1182(a)(3) (terrorist grounds of inadmissibility);

(b) Deportable under 8 U.S.C. §§ 1227(a)(1)(G) (marriage fraud ground of deportability), 1227(a)(2) (criminal grounds of deportability), or 1227(a)(4) (terrorist grounds of deportability);[796]

(5) He or she has not been convicted of an aggravated felony;[797] and

(6) He or she can demonstrate that removal from the U.S. would result in extreme hardship to himself or herself, or to his or her child or parent.[798]

e. A Quick Checklist to Screen for Possible "Domestic Violence" Non-LPR Cancellation Eligibility.

Following is a text checklist that will help you determine if your client might be eligible for "domestic violence" non-LPR cancellation of removal. A flow chart to help determine eligibility is found at **Attachment 3**.

(1) Is your client undocumented?

(2) If so, does he or she fall into one of the classes of abuse victims listed above?

(3) If so, has he or she been physically present in the U.S. for a continuous period of at least three years before being placed in removal proceedings?

(4) If so, is his or her prior criminal record clean in the sense that he or she has not done anything to make him or her inadmissible or deportable under any of the provisions listed above?

f. Preserving "Domestic Violence" Non-LPR Cancellation Eligibility.

If your client appears to be eligible for "domestic violence" non-LPR cancellation, you should try to avoid any pleas that would jeopardize such eligibility. Pleas to avoid include:

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[796] 8 U.S.C. § 1229b(b)(2)(A)(iv).

[797] *Id*.

[798] 8 U.S.C. § 1229b(b)(2)(A)(v).

(1) Any offenses that would preclude the client from demonstrating good moral character under 8 U.S.C. § 1101(f).

(2) Any offenses that would make the client inadmissible under 8 U.S.C. §§ 1182(a)(2) (criminal grounds of inadmissibility) or 1182(a)(3) (terrorist grounds of inadmissibility), or deportable under 8 U.S.C. §§ 1227(a)(1)(G) (marriage fraud ground of deportability), 1227(a)(2) (criminal grounds of deportability), or 1227(a)(4) (terrorist grounds of deportability).

(3) An aggravated felony.

3. Cancellation of Removal for Permanent Residents.

If your client is a permanent resident (LPR or "green card holder"), and if he or she has been in the United States for at least seven continuous years, he or she may be eligible for a form of relief from removal called Cancellation of Removal for Permanent Residents. The statutory provisions of LPR Cancellation are found at INA § 240A(a).[799]

a. Elements of LPR Cancellation.

In order to be eligible to apply for LPR cancellation, a client must meet the following requirements:

(1) He or she must have been a lawful permanent resident (i.e., had a "green card") for five years or more;

(2) He or she must have been residing in the U.S. in some lawful status for at least seven years; and

(3) He or she must not have been convicted of an aggravated felony.

As with non-LPR cancellation, certain events will "stop the clock" on accrual of residence. However, for LPR cancellation purposes, there are actually two clocks: the seven-year clock and the five-year clock.

The Seven-Year Clock.

What Starts It? The seven-year clock starts once the client entered the U.S. in any lawful status. That could include non-immigrant status (i.e., student, visitor, etc.) or as an immigrant (i.e., green card holder).

[799] 8 U.S.C. § 1229b(a).

What Stops It? The seven-year clocks stops on the earliest of the following events:

(1) The client is served with a Notice to Appear.

(2) The client commits an offense listed in INA §§ 212(a)(2),[800] 237(a)(2),[801] or 237(a)(4).

What Crimes Do Not Stop the Seven-Year Clock?

If the client already has been convicted of a crime involving moral turpitude (CIMT), but the CIMT fell under the petty offense exception,[802] the seven-year clock does not stop until the second CIMT offense is committed.[803]

If the client is convicted of a crime that makes him or her deportable under INA § 237(a)(2)[804] the seven-year clock does not stop unless the crime is "referred to" in INA § 212(a)(2).[805] This means, for example, that the seven-year clock does not stop for a client convicted of a firearms offense, which is mentioned in the deportable offenses section of the INA but not referred to in the inadmissible offenses section.[806] Other offenses that appear in INA § 237(a)(2) that are not referred to in § 212(a)(2) include crimes of domestic violence, crimes of stalking, violation of a protection order, and crimes of child abuse. However, if the offense of which the client is convicted is both a deportable and inadmissible crime (i.e., domestic violence offenses that involve infliction of serious bodily injury are also CIMTs), commission of the "dual" offense will stop the seven-year clock.[807]

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800 8 U.S.C. § 1182(a)(2).

801 8 U.S.C. § 1227(a)(2).

802 INA § 212A(a)(2)(A)(ii)(II), 8 U.S.C. § 1182(a)(2)(A)(ii)(II).

803 *Matter of Deando-Roma*, 23 I&N Dec. 597 (BIA 2003).

804 8 U.S.C. § 1227(a)(2).

805 8 U.S.C. § 1182(a)(2).

806 *Matter of Campos-Torres*, 22 I&N Dec. 1289 (BIA 2000).

807 *Barton v. Barr*, 140 S. Ct. 1442, 206 L. Ed. 2d 682 (2020).

The Five-Year Clock.

What Starts It? The five-year clock starts at the moment the client becomes an LPR (i.e., gets his or her "green card").

What Stops It? The five-year clock continues to run until the client's removal proceedings are concluded, which would include all proceedings before the Immigration Court, the BIA, and, if the client obtains a stay of removal during any federal court appeals, until those appeals are finally resolved.

b. A Quick Checklist to Screen for Possible LPR Cancellation Eligibility.

Following is a text checklist that will help you determine if your client might be eligible for LPR cancellation of removal. A flow chart to help determine eligibility is found at **Attachment 3**.

(1) Is your client a lawful permanent resident (LPR)?

(2) If so, has he or she been an LPR for at least five years?

(3) If so, has he or she been residing in the U.S. in some lawful status for at least seven years before being served with a Notice to Appear or before having committed a prior offense listed in the statutes outlined above?

c. Preserving LPR Cancellation Eligibility.

If the answer to all of the above questions is yes, your client may be eligible for LPR cancellation, and you should try to avoid any pleas that would jeopardize such eligibility. Pleas to avoid include:

(1) Any offense that would stop the seven-year clock from running, if the client has not already acquired seven years of continuous presence.

(2) An aggravated felony.

4. Adjustment of Status.

Some clients may be eligible to get green cards, usually as the result of their relationship to a qualifying relative who has immigration status. Certain clients may be eligible to adjust status (i.e., get a green card while remaining in the United States). Other clients may be required to leave the United States to get a green card by processing their applications through a U.S. consulate in their home country.

Adjustment of status is a form of relief from removal, in the sense that if a client is eligible to adjust status, and he or she is in removal proceedings, he or she can file the adjustment of status application as a defense to the removal case and, if the application is granted, he or she will avoid removal. Fortunately, the land mines of which criminal defense counsel must be aware are the same, whether the issue is adjustment of status or consular processing. In essence, you must try to avoid having the client convicted of a crime that will render him or her inadmissible under INA § 212,[808] which is a part of your baseline analysis in any event.

The ability to adjust status depends in part on the client's immigration status. "Regular" adjustment of status proceedings are first discussed below, and then adjustment of status proceedings for refugees.

a. Elements for "Regular" Adjustment of Status.

There are many ways a client may be eligible to adjust status. The discussion here focuses on eligibility based on a family relationship, which is the most common way in which a client would be eligible to adjust status.

In order to be eligible to adjust status, a client must meet the following requirements:

(1) He or she must have entered the United States with inspection and authorization.

(2) He or she must fall into one of the following categories:

(a) The client must have a U.S. citizen spouse.

(b) The client must have a U.S. citizen child age 21 or older.

(c) The client must be under age 21 and have a U.S. citizen parent.

(d) The client must have an approved visa petition filed by another qualifying relative with a current priority date.[809]

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[808] 8 U.S.C. § 1182.

[809] Unless the client falls into one of the first three categories (1) through (3) above, he or she will have to wait a number of years for a visa petition filed by another qualifying relative (for example, a U.S. citizen brother or sister) to become current. That is because there are long waiting lists in most visa categories. To be eligible for adjustment of status, a client must have an approved visa petition with a priority date that is current. There are various resources online that explain how to read and interpret the Visa Bulletin. For one example see

(3) He or she must not be inadmissible, or must be eligible for a waiver of any grounds of inadmissibility.

b. A Quick Checklist to Screen for Possible "Regular" Adjustment of Status Eligibility.

Following is a text checklist that will help you determine if your client might be eligible for "regular" adjustment of status. A flow chart to help determine eligibility is found at **Attachment 3**.

(1) Did your client enter the United States with inspection and authorization?

(2) If so, does he or she have a U.S. citizen spouse or U.S. citizen child 21 years of age or older?

(3) If not, is the client under age 21 and does the client have a U.S. citizen parent?

(4) If not, is the client the beneficiary of an approved visa petition with a current priority date which was filed for him or her by another qualifying relative?

c. Preserving "Regular" Adjustment of Status Eligibility.

To preserve your client's eligibility for adjustment of status, try to avoid pleading to any crimes that will make your client inadmissible under INA § 212.[810] If you are unable to avoid this, determine if the client is eligible for a waiver of any of the grounds of inadmissibility implicated by the crimes of which he or she is convicted. Most often, this means determining whether your client is eligible for a § 212(h) waiver.[811]

d. Elements for Refugee Adjustment of Status.

If your client is a refugee and is eligible to adjust status under INA § 209[812] because he or she has been in refugee status for at least one year,

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https://www.novacredit.com/resources/how-to-read-the-visa-bulletin/ (last visited October 16, 2020).

[810] 8 U.S.C. § 1182.

[811] *See* section VI.A.1., *supra*.

[812] 8 U.S.C. § 1159.

you have a little more leeway in terms of what crimes will make your client ineligible to adjust status. Although any crime that makes a client inadmissible could be a problem, the waiver of inadmissibility available to refugees who seek to adjust status is very generous.[813] It essentially allows waiver of all crime-related grounds of inadmissibility except drug trafficking offenses,[814] certain espionage offenses,[815] and terrorist activities.[816]

In order for your refugee client to be eligible to adjust status, he or she must meet the following requirements:

(1) He or she must have been admitted to or paroled into the United States as a refugee; and

(2) He or she must have been in refugee status for at least one year.

e. A Quick Checklist to Screen for Possible Refugee Adjustment of Status Eligibility.

Following is a text checklist that will help you determine if your client might be eligible for refugee adjustment of status. A flow chart to help determine eligibility is found at **Attachment 3**.

(1) Was your client admitted or paroled into the U.S. as a refugee?

(2) If so, has your client been in refugee status for at least one year?

f. Preserving Refugee Adjustment of Status Eligibility.

If you are unable to avoid a conviction that makes your client inadmissible, you should strive to avoid the convictions listed above that cannot be waived for refugees seeking to adjust status.

5. Asylum/Withholding of Removal.

Asylum and withholding of removal are two forms of relief from removal that are

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[813] INA § 209(c), 8 U.S.C. § 1159(c).

[814] INA § 212(a)(2(C), 8 U.S.C. § 1182(a)(2)(C).

[815] INA § 212(a)(3)(A), 8 U.S.C. § 1182(a)(3)(A).

[816] INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B). There are actually two other grounds of inadmissibility that can be waived under § 209(c) but they do not relate to state crimes, and they are not mentioned here.

potentially available to individuals who fear that if they return to their home country they will suffer persecution, either by their government, or by a group or groups their government is unwilling or unable to control.

Asylum and withholding cases are extremely complex, both factually and legally. The purpose of discussing them here is simply to make you aware of which criminal convictions would jeopardize such claims. You should certainly not trouble yourself with trying to determine the validity of any possible asylum or withholding claim your client may ultimately wish to assert to avoid removal. That will be the job of the client's immigration lawyer if and when the time comes.

a. Elements of the Claims.

Asylum. The elements of an asylum claim are that the client either has been persecuted or has a well-founded fear of being persecuted by the government or by a group or groups the government is unable or unwilling to control. The feared persecution must be on account of the client's race, religion, nationality, membership in a particular social group, or political opinion. The Supreme Court has held that the "well-founded" fear standard can be met by as little as a ten percent chance that the persecution will actually occur.[817] Additionally, unless some very limited exceptions apply, a client must file an asylum claim within one year of the date the client last entered the U.S., or s/he cannot pursue an asylum claim. Finally, asylum claims can be filed affirmatively (before a client is in removal proceedings) or defensively, as a form of relief from removal in removal proceedings.

Withholding of Removal. The elements of a withholding claim are the same as for an asylum claim. The difference between the two forms of relief lies in the burden of proof. While it is enough to show a "well-founded fear" of persecution to win an asylum case, a client must show that it is more likely than not he or she will be persecuted in order to win a withholding case. This burden of proof is essentially the "preponderance of the evidence" burden of proof that exists in most civil cases. Unlike asylum claims, withholding of removal claims can only be filed defensively in the context of a removal proceeding. Additionally, withholding claims do not have a one-year statute of limitations, so they can be asserted even after the client has been in the U.S. for a year.

b. A Quick Checklist to Screen for Possible Asylum or Withholding of Removal Eligibility.

Following is a text checklist that will help you determine if your client

[817] *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).

might be eligible for asylum or withholding of removal. A flow chart to help determine eligibility is found at **Attachment 3**.

(1) Has your client expressed a fear of being persecuted if he or she must return to his or her home country?

(2) If so, does the client fear being persecuted because of his or her race, religion, nationality, membership in a particular social group, or political opinion?

c. Preserving Eligibility for Asylum/Withholding of Removal.

If the answers to these questions are yes, your client may be eligible to raise an asylum or withholding claim as a defense to removal when the time comes. You should try to avoid any pleas that would imperil such relief.

Asylum. There are two crime-related bars to asylum.

(1) Aggravated felony. Anyone convicted of an aggravated felony is barred from receiving asylum.

(2) Particularly serious crime. A client who is convicted of a "particularly serious crime" is ineligible for asylum. For purposes of the asylum analysis, a "particularly serious crime" includes all aggravated felonies. However, a crime may be a "particularly serious crime" even if it is not an aggravated felony.[818]

Withholding. There are two crime-related bars to withholding of removal.

(1) Aggravated felony + five-year term of imprisonment. Anyone convicted of an aggravated felony and, as a result of the conviction, is sentenced to a term of imprisonment of five years or more is barred from receiving withholding of removal.

(2) Particularly serious crime. A client who is convicted of a particularly serious crime (as defined above) is ineligible for withholding of removal.

6. Temporary Protected Status.[819]

Certain non-citizens are entitled to an immigration benefit called Temporary

[818] *See* section V.E.2., *supra*.

[819] *See* the discussion of TPS at section III.I.1., *supra*.

Protected Status (TPS). In essence, TPS is permission from the United States Attorney General to non-citizens from certain countries that allows them to remain in the U.S. until and unless the Attorney General determines it is safe for them to return to their home country. TPS is most often granted to individuals from countries that have suffered significant natural disasters. As an example, the Attorney General granted TPS to Haitians in January 2010 who were in the United States at the time of the earthquake that devastated Haiti. A complete current list of all countries for which the Attorney General has designated TPS can be found on the USCIS website.[820]

a. Elements of a TPS Claim.

The way in which a client can initially qualify for TPS is complicated and is not necessary to this discussion. For purposes of your *Padilla* analysis, all you need to know is whether your client is a current TPS recipient or is eligible for TPS under a recent designation by the United States Attorney General. You can determine if your client has been granted TPS by asking to see any paperwork from USCIS granting TPS to the client. Alternatively, the client may have an employment authorization document ("work card") issued by USCIS. The category listed on the work card would be (c)(19). You can determine if the Attorney General has recently designated your client's country as being eligible for TPS by checking the USCIS website referenced in the previous footnote.

b. A Quick Checklist to Screen for TPS Eligibility.

Following is a text checklist that will help you determine if your client might have received TPS. A flow chart to help determine this status is found at **Attachment 3**.

(1) Is your client from one of the countries currently designated by the U.S. Attorney General as eligible for TPS?

(2) If yes, has your client actually received a grant of TPS and/or an employment authorization document from USCIS?

c. Preserving TPS Eligibility.

In order to be eligible for TPS, a client must not have been convicted of any felony, or two or more misdemeanors.[821] If possible, avoid any plea to a felony, or to a second misdemeanor.

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[820] U.S.C.I.S., *Temporary Protected* Status, https://www.uscis.gov/humanitarian/temporary-protected-status (last visited October 15, 2020).

[821] INA § 244(c)(2)(B)(i); 8 U.S.C. § 1254a(c)(2)(B)(i).

7. Deferred Action.[822]

There are two major types of deferred action: (1) Deferred Action for Childhood Arrivals (DACA); and (2) VAWA deferred action. Each one will be reviewed below.[823]

As a reminder, deferred action is a program or policy of the DHS that allows ICE to defer or postpone any action to remove someone from the United States who would otherwise be removable. With the exception of Deferred Action for Childhood Arrivals (DACA), there are no official forms on which a client applies for deferred action and there are no permanent formal rules governing the granting of deferred action. It is essentially a matter of administrative grace being given to certain persons who DHS believes present compelling humanitarian factors or other positive equities. DACA, on the other hand, is a much more formal program and has prescribed forms and guidelines that applicants must use and meet in order to qualify for DACA relief.

a. A Quick Checklist to Screen for DACA Eligibility.

Following is a text checklist that will help you determine if your client might be eligible for DACA or might have been approved for DACA. A flow chart to help determine this status is found at **Attachment 3**.

(1) Did your client come to the U.S. before he or she turned 16?

(2) If so, had he or she continuously resided in the U.S. for at least five years as of June 15, 2012?

(3) If so, was he or she physically present in the U.S. on June 15, 2012?

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[822] *See* the detailed discussion of Deferred Action at section III.I.3., *supra*.

[823] Prior to the Attorney General's decision in *Matter of Castro-Tum*, 27 I&N Dec. 187 (AG 2018), the Board of Immigration Appeals also recognized that prosecutorial discretion in an Immigration Court context could take the form of administrative closure of the removal case. *See Matter of Avitisyan*, 25 I&N Dec. 688 (BIA 2012). But *Castro-Tum* overruled *Avitisyan*. However, as of this writing, the future of *Castro-Tum* is unclear as federal court litigation continues. At least two circuit courts have held it was wrongly decided. *Meza Morales v. Barr*, 973 F.3d 656 (7th Cir. 2020); *Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019). Notably, the Seventh Circuit opinion in *Meza Morales* was written by Judge Amy Coney Barrett.

(4) If so, is he or she currently in school or did he or she graduate from high school, obtain a GED, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States?

(5) If so, was he or she under age 31 as of June 15, 2012?

If the answers to all of these questions are yes, then your client may be eligible for Deferred Action for Childhood Arrivals.

b. A Quick Checklist to Screen for VAWA Deferred Action Eligibility.

Following is a text checklist that will help you determine if your client might be eligible for or have received VAWA deferred action. A flow chart to help determine this status is found at **Attachment 3**.

(1) Has your LPR client filed a self-petition (USCIS Form I-360) in order to obtain legal status on his or her own behalf without the assistance of his or her USC or LPR abusive spouse?

(2) If so, is an immigrant visa immediately available to him or her under the Visa Bulletin?

(3) If not, has USCIS granted your client deferred action, as evidenced by USCIS Form I-797 and/or an employment authorization document, category (c)(14)?

(4) If not, has the client recently filed the I-360 with USCIS but not yet heard if he or she will be granted deferred action?

c. Preserving Deferred Action Eligibility.

(1) DACA.

In order to preserve DACA eligibility, your client must not plead to or be convicted of any felony offense (i.e., a Class IV felony or higher in Nebraska), must not plead to or be convicted of any "significant misdemeanor offense," and must not have three or more misdemeanor convictions of any kind.

(2) VAWA.

Because there are no hard and fast rules on when USCIS will grant VAWA deferred action to an applicant, it is difficult to lay down a hard and fast rule on how criminal proceedings may affect eligibility for this type of deferred action. However, since

deferred action is a discretionary benefit, it is safe to assume that any type of criminal conviction has the potential to affect a client's continued eligibility for it.

The more serious the felony conviction, the less likely it is that your client will be given prosecutorial discretion. Therefore, try to avoid pleading to any felonies altogether, and certainly try to avoid those that involve violence.

Also, if anything in the record of conviction indicates any possible gang ties or membership, you should try to expunge such references in order to maximize your client's chances to obtain prosecutorial discretion.

8. Voluntary Departure.

Voluntary departure[824] is a form of relief from removal that allows one to leave the United States at his or her own expense in lieu of being involuntarily removed. Because voluntary departure involves a person agreeing to leave the U.S., it is often a form of relief from removal of last resort.

The benefit of voluntary departure is that it allows a client some time to wrap up his or her affairs before leaving the country, allows the client to take as much property as the client wishes (since he or she will be paying for his or her own transportation) and, most importantly, does not place the client under a 10-year bar on returning to the U.S., which would be the case if the client left pursuant to a removal order.

a. Elements of Voluntary Departure.

Pre-Conclusion Voluntary Departure. In order to be eligible for voluntary departure requested before the conclusion of removal proceedings (i.e., at the Master Calendar stage), a client must not be deportable as an aggravated felon or as a "terrorist."[825]

Post-Conclusion Voluntary Departure. In order to be eligible for voluntary departure at the conclusion of removal proceedings, a client must meet the following requirements:

(1) He or she must have been physically present in the United States for at least one year before being served with a Notice to Appear;

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[824] INA § 240B, 8 U.S.C. § 1229c.

[825] INA § 240B(a), 8 U.S.C. § 1229c(a).

(2) He or she must have been a person of "good moral character" for at least five years before the date he or she applies for voluntary departure;

(3) He or she must be not deportable as an aggravated felon or as a "terrorist"; and

(4) He or she must establish by clear and convincing evidence that he or she has the means to depart the U.S. at his or her own expense and intends to do so.[826]

b. A Quick Checklist to Screen for Voluntary Departure Eligibility.

Following is a text checklist that will help you determine if your client might be eligible for voluntary departure. A flow chart to help determine this status is found at **Attachment 3**.

Pre-Conclusion Voluntary Departure.

(1) Has your client been convicted of an aggravated felony?

(2) Is your client deportable as a "terrorist" under INA § 237(a)(4)(B)?[827]

Post-Conclusion Voluntary Departure.

(1) Was your client physically present in the U.S. for at least five years before being served a Notice to Appear by ICE?

(2) If so, has your client been a person of "good moral character"[828] for at least the past five years?

(3) If so, is your client's criminal background free of any aggravated felony convictions or "terrorist activity"?

(4) If so, does your client have the ability to depart the U.S. at his or her own expense when the time comes?

If the answers to all of these questions are yes, then your client may be eligible for voluntary departure and you should do what you can to preserve that eligibility.

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826 INA § 240B(b), 8 U.S.C. § 1229c(b).

827 8 U.S.C. § 1227(a)(4)(B).

828 INA § 101(f), 8 U.S.C. § 1101(f).

c. Preserving Eligibility for Voluntary Departure.

The main way in which you can preserve your client's eligibility for voluntary departure is to avoid conviction of an aggravated felony or "terrorist" offense, since either such conviction will bar a client from receiving either type of voluntary departure.

Ultimate caution would also entail avoiding conviction of any offenses that would bar the client from demonstrating "good moral character."

9. Orders of Supervision (OSUP).

Clients who are under orders of supervision are essentially living on the administrative grace of ICE. Usually, these are clients who have final orders of removal but for whom ICE has been unable to obtain travel documents because the governments with which ICE is dealing are either unable or unwilling to issue such travel documents. More details are spelled out in the regulations,[829] but among the factors that ICE considers in deciding whether to release a client under an Order of Supervision are whether the client is a "non-violent person," whether the client is likely to pose a threat to the community if released, and whether the client is a flight risk. Obviously, any serious criminal offense (that is, anything beyond traffic infraction or the like) will imperil a client's ability to remain free under an Order of Supervision. Certainly any DUI offense is likely to result in the client losing OSUP privileges. So while there are no hard and fast rules about which convictions to avoid, it is important to understand that running afoul of the law will put a client with an OSUP in a perilous situation.

10. Prudential Revocation of Non-Immigrant Visas.

This topic is discussed in greater detail earlier in this Guide.[830] But recall that even a **charge** of DUI will put a non-immigrant's visa in peril. Other convictions could also lead to prudential revocations, depending on the seriousness of the crime.

11. Naturalization.

Although naturalization (i.e., the process by which a permanent resident becomes a United States citizen) is technically not a form of relief from removal or waiver, it is something you should have your eye on if you are representing a client who is a permanent resident.

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[829] 8 C.F.R. § 241.5 generally deals with orders of supervision, while 8 C.F.R. § 241.4(e) contains the criteria for release that ICE considers in deciding whether to release a detained client under an order of supervision.

[830] *See* section V.C.2., *supra*.

> In terms of representing a client in a criminal case, the only issue for you as criminal defense counsel is to try to avoid having the client convicted of an offense that would preclude him or her from demonstrating "good moral character" under INA § 101(f).[831]

VII. CRITICAL CATEGORIES IN IMMIGRATION LAW.

This portion of the Guide discusses the "critical categories" within the spectrum of criminal conduct or convictions that enhance immigration penalties for non-citizen clients. When analyzing a criminal offense, practitioners are urged to think about which, and how many, of these "critical categories" may be triggered if the client is convicted of the offense being analyzed. Some categories carry more severe consequences than others, and practitioners should take these differentials into consideration.

A. Category 1 -- Lack of Good Moral Character.

As discussed above,[832] commission of an act or conviction of a crime that brings one within the provisions of INA § 101(f)[833] will prevent that person from establishing "good moral character." Although such a prohibition, in and of itself, does not have any negative immigration consequences, it can make certain immigration benefits unavailable. And remember that some of the acts or convictions that prevent a person from demonstrating good moral character also have other, and immediate, negative immigration consequences, such as inadmissibility or deportability.

B. Category 2 -- Juvenile Offenses.

Juvenile delinquency offenses are not "crimes" for purposes of the INA, and therefore cannot serve as the basis for inadmissibility or removal.[834] Obviously, then, it would be best if your client is charged in juvenile court as a juvenile rather than as an adult. But what if your juvenile client is charged as an adult? Does that automatically mean that if he or she is convicted of the non-juvenile offense he or she has been convicted of a "crime" for immigration purposes? No. He or she has only been convicted of a "crime" if the state offense does not qualify for treatment as a juvenile delinquency offense under the Federal Juvenile Delinquency Act (FJDA).[835]

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831 8 U.S.C. § 1101(f).

832 *See* section V.E.1., *supra*.

833 8 U.S.C. § 1101(f).

834 22 I&N Dec. 1362 (BIA 2000).

835 18 U.S.C. §§ 5031-32.

In *Matter of Devison-Charles*[836] and the cases cited therein, the Board of Immigration Appeals has repeatedly held that whether a juvenile has been convicted of a "crime" depends on whether a state criminal offense qualifies for treatment as a juvenile offense under the FJDA. The FJDA generally defines juvenile delinquency as violation of a law of the U.S. committed by a person before reaching age 18 if such act would have been a crime if committed by a person over age 18.[837] The FJDA also provides that any person under the age of 15 can be subject to prosecution as an adult if such a person is alleged to have committed certain crimes of violence or certain controlled substance offenses.[838] If, however, a person is alleged to have committed certain specified crimes of violence or used a firearm in the commission of certain offenses, a person age 13 and older might be subject to being charged as an adult.[839]

One of the valuable lessons of *Matter of Devison-Charles* is that the state statutory scheme for dealing with juveniles does not have to be an exact match with the FJDA in order for the state scheme to qualify as "comporting" with the FJDA. The New York scheme at issue in *Devison*-Charles, for example, proceeded with an adjudication of guilt before determining the offender's status. However, if the offender was found guilty but also found eligible to be treated as a "youthful offender," then the conviction was automatically vacated. This, the BIA held, was the equivalent of a direct reversal on appeal, and therefore the offender had never been "convicted" of a criminal offense, as that term is defined in INA § 101(a)(48)(A).[840] Further, the BIA held that when the juvenile violated his probation and was re-sentenced, he was still a juvenile offender, even though his re-sentencing took place when he was 25 years of age.[841]

It is therefore very clear that if your client is adjudicated as a juvenile delinquent under the Nebraska Juvenile Code, the client will not have been convicted of a criminal offense for immigration purposes. However, if the prosecutor seeks to treat your under-18 year-old client as an adult and you are unsuccessful in having the case transferred to the juvenile court under Neb. Rev. Stat. § 29-1816, the disposition of such a criminal charge will not necessarily be considered a conviction for purposes of immigration law. Under the BIA precedent discussed above, such a conviction will only be treated as a conviction of a crime for immigration purposes if your client would have been eligible to be prosecuted as an adult under the FJDA. So it is important to be aware generally of the test employed by the FJDA even if your client is prosecuted as an adult under Nebraska

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836 22 I&N Dec. 1362 (BIA 2000).

837 18 U.S.C. § 5031.

838 18 U.S.C. § 5032.

839 *Id*.

840 8 U.S.C. § 1101(a)(48).

841 *Devison-Charles*, 22 I&N at 1372-1373.

law. You may be able to shape the case in such a way that your client could be considered a juvenile under the FJDA, and therefore any state court conviction would not carry with it negative immigration implications.

C. Category 3 -- Convictions.[842]

Generally speaking, it is in a client's best interests not to have a conviction on his or her record. In other words, if counsel can make arrangements, such as pretrial diversion, that will not result in the client having a "conviction" entered against him or her, the negative immigration consequences for the client may either not exist at all or, at the very least, are likely to be less severe.

D. Category 4 -- Petty Offenses.

If you are unable to prevent a criminal conviction of a crime involving moral turpitude, try to make the crime fit under the "petty offense" exception to inadmissibility, found at INA § 212(a)(2)(A)(ii)(II).[843] Although such a conviction will not necessarily prevent your client from facing removal proceedings,[844] it will relieve him or her from having to deal with an additional ground of inadmissibility if and when he or she is eligible in the future to apply formally for admission into the U.S.

E. Category 5 -- Particularly Serious Crimes.

Although conviction of a "particularly serious crime," in and of itself, carries no direct consequences regarding deportation or inadmissibility,[845] such a conviction does carry collateral consequences.[846] In order to preserve immigration options for clients for whom this is an issue (i.e., those clients who may be eligible or need to apply for either asylum or withholding of removal), you should be sensitive to this issue.

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[842] *See* the definition and discussion of what constitutes a "conviction" in section V.D.2., *supra*.

[843] 8 U.S.C. § 1182(a)(2)(A)(ii)(II). *See* section V.C.3.d.(2), *supra*, for a discussion of this topic.

[844] For example, if your client was formally and legally admitted into the U.S. and is deportable under INA § 237(a)(2)(A)(i) because she or he is convicted of a crime involving moral turpitude within five years of his or her last entry into the U.S. and the crime of which she or he was convicted carried a possible sentence of a year or more, the fact that she or he is convicted of a "petty offense," in and of itself, will not stop ICE from beginning removal proceedings.

[845] That is, unless the nature of the crime makes it the type of crime that **does** have direct deportation or inadmissibility consequences.

[846] *See* section V.E.2., *supra*.

F. Category 6 -- Significant Misdemeanors.

We put this category ahead of "regular" misdemeanors since it will affect a client's ability to either qualify for or maintain DACA status.[847] If your client either has DACA status or might be eligible to apply for DACA, then you should avoid convictions for any "significant misdemeanors," as defined by the DACA guidelines. Also, recall that conviction of three or more misdemeanors of any type will affect eligibility for DACA.

G. Category 7 -- Misdemeanors.

Not surprisingly, it is normally better if a client is convicted of a misdemeanor rather than a felony, since a felony conviction usually carries with it more severe immigration consequences than a misdemeanor conviction. However, this is not universally true, and you need to distinguish among the different types of misdemeanors to find out which are less harmful.

1. Not Involving Moral Turpitude.

If your non-citizen client is going to be convicted of a misdemeanor, then it might as well be for this type of a misdemeanor. Most of the time, conviction of a misdemeanor not involving moral turpitude will have less severe immigration implications. However, there are exceptions.

Conviction of a misdemeanor not involving moral turpitude will make a client inadmissible **if** the client was previously convicted of another crime **and if** the aggregate sentences to which the client were sentenced are five years or more.[848] And conviction of virtually all misdemeanor drug offenses will render your client both inadmissible and deportable.[849] Finally, some misdemeanors actually fit the definition of aggravated felonies.[850] Obviously, conviction of a misdemeanor not involving moral turpitude that is included in the definition of an aggravated felony should be avoided if at all possible, since such a conviction carries very negative immigration consequences.[851]

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847 *See* section III.I.3.a., *supra*.

848 INA § 212(a(2)(B), 8 U.S.C. § 1182(a)(2)(B). *See* section V.C.4., *supra*.

849 *See* sections V.C.5. and V.D.7., *supra*.

850 *See* section V.D.6., *supra*.

851 *Id*.

2. Involving Moral Turpitude.

Conviction of even one crime involving moral turpitude at the misdemeanor level can make your client both inadmissible and deportable.[852] However, if your client's conviction is not within five years of his or her last entry into the U.S., he or she can only be deported if he or she is convicted of two or more crimes involving moral turpitude that do not arise out of a single scheme of criminal conduct.[853] If your client is facing a second conviction for a crime involving moral turpitude, you can minimize the deportation (but not the inadmissibility) consequences by trying to characterize the conviction, if possible, as arising out of the same scheme of criminal conduct as the first conviction.

H. Category 8 -- Domestic Violence Offenses.

Conviction of a domestic violence offense[854] or violation of a protection order results in the client being deportable under § 237(a)(2)(E) of the INA,[855] but does not make him or her inadmissible under § 212 of the INA[856] at the time he or she seeks to re-enter the U.S. Conviction of a domestic violence offense may also implicate other grounds of deportability or inadmissibility, such as those dealing with crimes involving moral turpitude,[857] and may also result in a finding that the client lacks good moral character.[858] Such consequences should be considered when counseling a client facing such a charge.

I. Category 9 -- Firearms Offenses.

Conviction of a firearms offense will make your non-citizen client deportable.[859] Deportation as a result of such a conviction leaves an immigration practitioner very few options to prevent deportation.

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[852] *See* sections V.C.3. and V.D.4., *supra*.

[853] *See* section V.D.5., *supra*.

[854] See section V.D.9., *supra*, for a definition of "domestic violence offense."

[855] 8 U.S.C. § 1227(a)(2)(E).

[856] 8 U.S.C. § 1182.

[857] *Matter of Tran*, 21 I&N Dec. 291 (BIA 1996).

[858] *See* INA § 101(f)(3), 8 U.S.C. § 1101(f)(3). *See also* section V.E.1., *supra*.

[859] INA § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C). But recall that, in Nebraska, most firearms offenses will not make the client deportable because the Nebraska definition of "firearm" is overbroad. *See* section V.D.8., *supra.*

Conviction for a firearms offense makes one deportable, but there is no comparable ground of inadmissibility. But conviction of a firearms offense, depending on the facts of the case, might implicate some of the other grounds of inadmissibility, particularly if the conviction is at the felony level.[860]

Whether or not it is a good idea to accept a plea regarding a firearms offense depends a great deal on your client's immigration status. For example, if she or he has the ability to re-enter the U.S. immediately because of some qualifying relationship, then a conviction of a firearms offense, in and of itself, is not a bar to immediate readmission and may cause less problems for a client than, say, a conviction of a second crime involving moral turpitude.[861] Of course, such a result is counter-intuitive, since most practitioners would naturally assume that conviction for a firearms offense is more serious than a conviction for theft. But that is not necessarily the case in an immigration context.

J. Category 10 -- Controlled Substance Offenses.

Conviction of any drug offense, with the exception of a single conviction of simple possession of 30 grams or less of marijuana,[862] will have drastic immigration consequences for a non-citizen client. Conviction of a drug crime renders a client both deportable[863] and inadmissible.[864] Additionally, if the client is convicted of a drug trafficking crime, she or he has committed an aggravated felony.[865]

The immigration stakes are quite high where drug convictions are concerned. With the exception of simple possession of 30 grams or less of marijuana, if a client is convicted of a drug crime, whether it be simple possession or drug trafficking, she or he is not only deportable, but ***permanently*** inadmissible as an immigrant.[866] In other words, such a

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[860] For example, if a firearm is involved in a conviction for second degree assault in Nebraska under Neb. Rev. Stat. § 28-309(1)(b), such a conviction would constitute an aggravated felony, since a "crime of violence" is involved. Most courts would also hold that such a crime is a crime involving moral turpitude under the “assault plus” rationale articulated by various courts and discussed in section V.C.3.c.(1), *supra*.

[861] Unless, of course, the firearms offense can also be considered a crime involving moral turpitude for some reason.

[862] *See* sections V.C.5.(inadmissibility) and V.D.7. (deportability), *supra*.

[863] INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i).

[864] INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II).

[865] INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B).

[866] Under some circumstances, the client may be able to return to the U.S. as a non-immigrant, but, as the law stands now, she or he will never be able to return again as an

client will be deported from the U.S. and will never be able to return legally as a permanent resident. In addition, there are very few forms of relief from deportation available to a client convicted of a drug offense. Drug offenses are truly a kiss of death for non-citizen clients.

K. Category 11 -- Aggravated Felonies.

Needless to say, conviction of an aggravated felony should be avoided, almost at all costs. A non-citizen client who is convicted of an aggravated felony is deportable[867] and is also ineligible for most forms of relief from deportation.[868]

immigrant. *See* INA § 212(d), 8 U.S.C. § 1182(d), for the provisions regarding waivers of inadmissibility available to non-immigrants.

[867] INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii). In fact, it is a virtual certainty that such a client **will** be deported.

[868] For example, as discussed earlier, an aggravated felon is ineligible to apply for asylum, cancellation of removal, or voluntary departure. *See* INA § 208(b)(2)(B)(i), 8 U.S.C. §§ 1158(b)(2)(B)(i); INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3); and INA § 240B(a)(1), 8 U.S.C. § 1229c(a)(1), respectively.

ATTACHMENT 1

CHECKLIST TO HELP DETERMINE IMMIGRATION CONSEQUENCES OF CRIMINAL PROCEEDINGS

CHECKLIST

I. Use Questionnaire (**Attachment 2**) to gather information related to the steps in this Checklist

II. Determine client's citizenship/immigration status.

A. United States citizen (unless renounced or revoked -- *see* section III.B.e.)

B. Legal permanent resident (verified by I-551 card, a/k/a "green card")

C. Conditional permanent resident (verified by I-551, CPR Resident Alien card)

D. Non-immigrant (verified by Form I-94)

E. Parolee (verified by Form I-94)

F. Refugee (verified by stamp in passport, refugee document or employment authorization document)

G. Asylum recipient (verified by asylum document or employment authorization document)

H. Special categories of immigrants (*see* section III.I.)

1. TPS recipients
2. Deferred Action recipients
   a. DACA
   b. VAWA
   c. Prosecutorial discretion
3. Voluntary departure recipients
4. Cancellation of removal recipients
5. Clients released under an order of supervision (OSUP)
6. Stay of removal recipients

I. Undocumented client (entered without inspection or initially entered with inspection but authorization to remain in the U.S. has since expired)

III. Explore follow-up information.

A. If client is a legal permanent resident or conditional permanent resident, determine the day, month and year the client obtained such status and verify that client's status is still valid.

B. If client is a non-immigrant, determine type of non-immigrant (i.e., student, visitor, temporary worker, etc.) and the date on which client's non-immigrant status will expire (stated on I-94 form).

C. If client is a refugee or asylum recipient, determine when such status was conferred on client and how long client has been residing in the U.S.

D. If client is undocumented or out of status, determine the following:

1. The date on which client *last* entered the U.S.

2. Whether client has ever been in removal proceedings (if so, get dates and details, including information on whether a removal order was entered against client).

3. Determine citizenship/immigration status of client's spouse or adult children (children age 21 or older), if applicable.

IV. Categorize crime with which client is charged.

A. Crime involving moral turpitude[1]

B. Drug offense[2]

C. Aggravated felony[3]

D. Domestic violence offense[4]

E. Firearms offense[5]

F. Other crimes that could make client inadmissible or deportable[6]

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[1] *See* sections V.C.3. and V.D.4., *supra*.

[2] *See* sections V.C.5. and V.D.7., *supra*.

[3] *See* section V.D.6., *supra*.

[4] *See* section V.D.9., *supra*.

[5] *See* section V.D.8., *supra*.

[6] *See* sections V.C. and V.D., *supra*.

V. Determine what "critical categories" are present that should be considered.

A. Has client been charged with crime that could result in "bad moral character"?[7]

B. Is there a possibility of working out an arrangement that would not result in a "conviction" for immigration purposes?[8]

C. Could client be charged as a juvenile rather than as an adult?[9]

D. If client has a previous criminal conviction, will crime with which she or he is charged have immigration consequences?[10]

E. Has the client been charged with a “significant misdemeanor”?[11]

F. If client is charged with a misdemeanor, is it a "crime involving moral turpitude"?[12]

G. Is the client charged with a "firearms offense"?[13]

H. Is the client charged with a "domestic violence offense"?[14]

I. Is the client charged with a "particularly serious crime"?[15]

J. Is the client charged with a drug offense?[16]

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[7] *See* section V.E.1., *supra*.

[8] *See* section V.D.2., *supra*.

[9] *See* section V.C.d.(1)., *supra*.

[10] *See* sections V.C.4. and V.D.5., *supra*.

[11] See section V.E.3., *supra.*

[12] *See* sections V.C.3. and V.D.4., *supra*.

[13] *See* section V.D.8., *supra*.

[14] *See* section V.D.9., *supra*.

[15] *See* section V.E.2.., *supra*.

[16] *See* sections V.C.5., and V.D.7., *supra*.

K. Is the client charged with a crime that is an "aggravated felony"?[17]

VI. Determine if the client has been convicted of any previous crimes, and get details on all such crimes (jurisdiction where committed, statute(s) involved, sentence(s) imposed, possible penalty(ies), etc.). Determine how, if at all, such prior offenses may affect the client's inadmissibility or deportability if the client is convicted of the offense(s) with which she or he is charged.

VII. Determine if the charge the client faces or the plea the client is considering will potentially affect any relief from removal for which the client might be eligible.[18]

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[17] *See* section V.D.6., *supra*.

[18] *See* section VI., *supra*.

ATTACHMENT 2

QUESTIONNAIRE TO AID CRIMINAL DEFENSE LAWYERS REPRESENTING NON-CITIZENS

Immigration Questionnaire

Client Name:	
Date of Birth:	
Country of Birth:	
Country of Citizenship:	
Country of citizenship of both parents:	
Date of FIRST entry into U.S.:	
Place of FIRST entry into U.S. (name of airport, U.S.-Mexico border, etc.):	
Manner of entry into U.S. (i.e. without inspection, tourist visa, employment based visa, student visa, green card, etc.): <u>Attach copies of all available documentation</u>.	
If client entered with inspection, when does/did period of authorized stay in the U.S. expire (i.e. date on I-94 form or other period of authorized stay)? <u>Attach copies of all available documentation</u>.	
Dates of ALL exits and re-entries from and to U.S. since first entry, in chronological order:	
Manner of EACH re-entry into the U.S. listed in the previous box. <u>Attach copies of all available documentation</u>.	

What is client's current immigration status (permanent resident, student, refugee, TPS recipient, asylee, over-stay, no status, etc.)? Attach copies of all available documentation.
Does client have an employment authorization document ("EAD")? If yes, what is the expiration date and category on the EAD? Attach copy of any EAD in client's possession.
Is client married? If yes, when? What is spouse's immigration status?
Does client have any children? If yes, dates and places of birth of each child and immigration status of each child.
Has client ever filed any application with Immigration? If so, what type of application, when was it filed, and what was the result of the application? Attach copies of any available documentation.
Has client ever been detained by Immigration or put in removal (deportation) proceedings? If so, give dates and details. Attach copies of any available documentation.

Has client ever been detained by Immigration at the border and returned to their home country? If yes, when? What exactly happened? <u>Attach copies of any available documentation</u>.
Has client ever been a victim of a crime in the U.S.? If yes, provide date(s) and details. <u>Attach copies of all documentation</u>.
Notes:

Complete table on page 4.

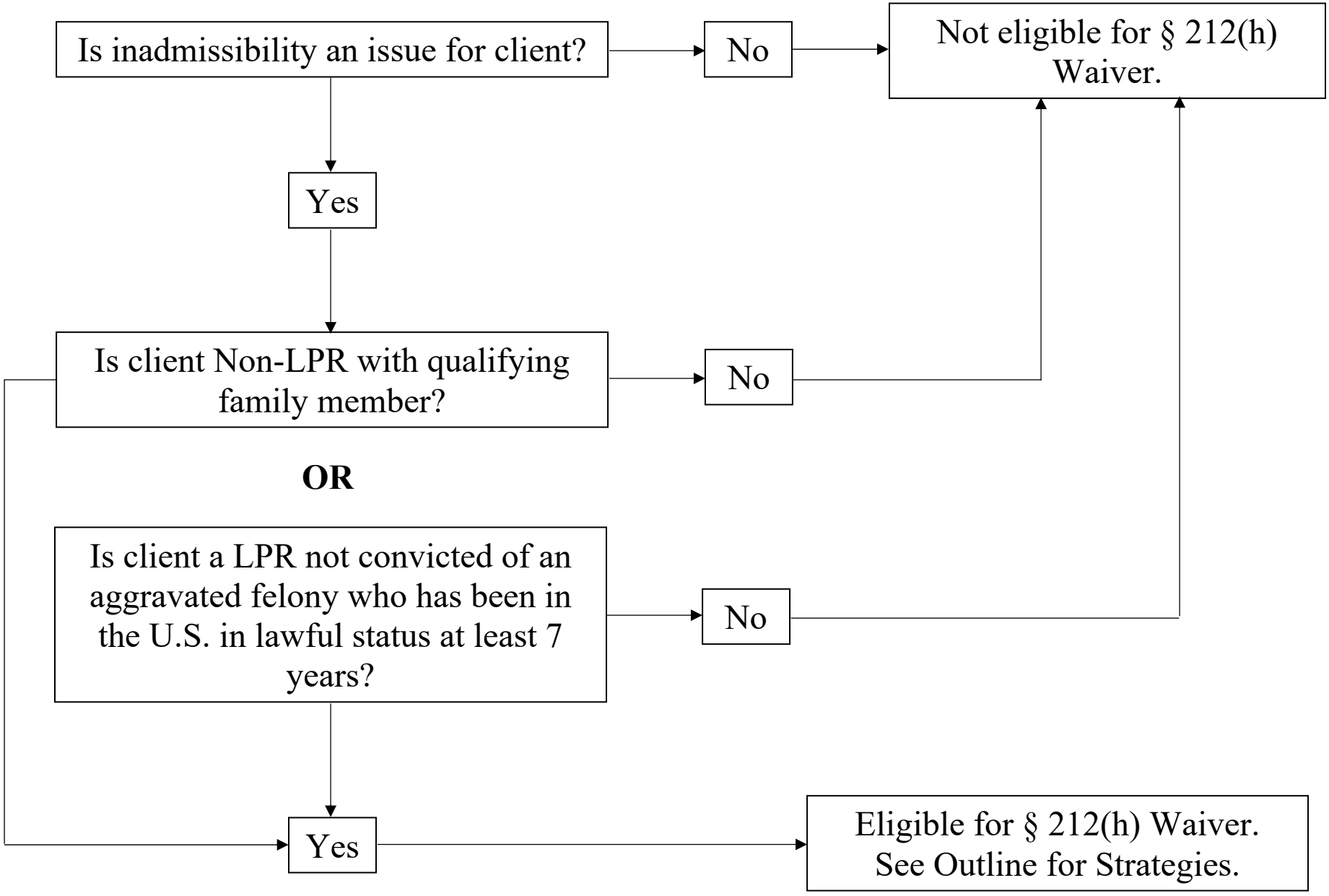
List (1) ALL crimes client has been charged with or convicted of, (2) the dates of each underlying act resulting in charges and/or convictions, (3) the number of each statute under which the client was charged/convicted, (4) the case number of each case in which the client was charged/convicted, and (5) the final disposition of each charge or conviction. Include all foreign convictions. Attach copies of all available documentation.

Crime Charged/Convicted	Date of Underlying Act	Statutes Charged/Convicted	Case #	Final Disposition

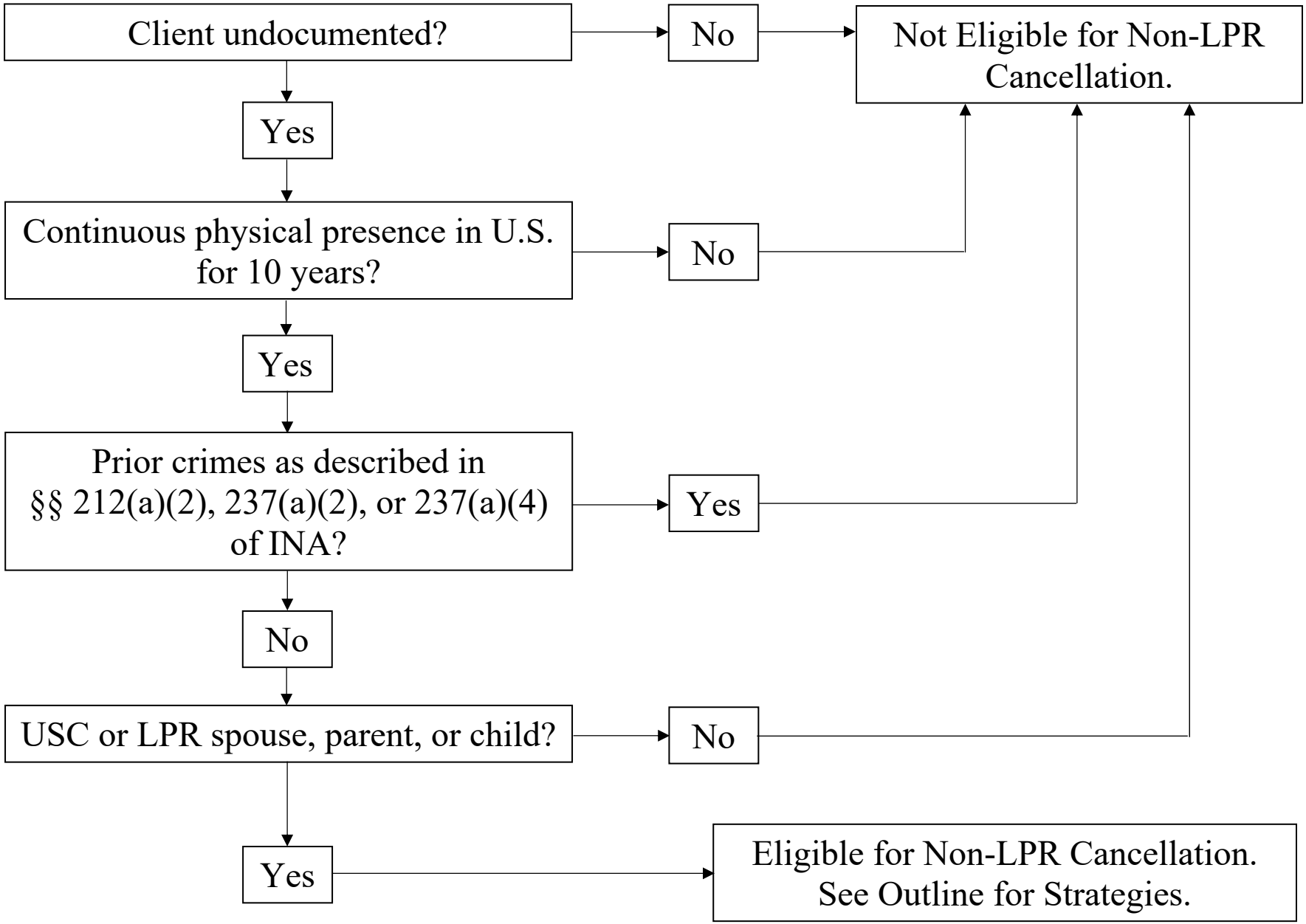
ATTACHMENT 3

FLOW CHARTS FOR TYPES OF WAIVERS OF INADMISSIBILITY AND RELIEF FROM REMOVAL

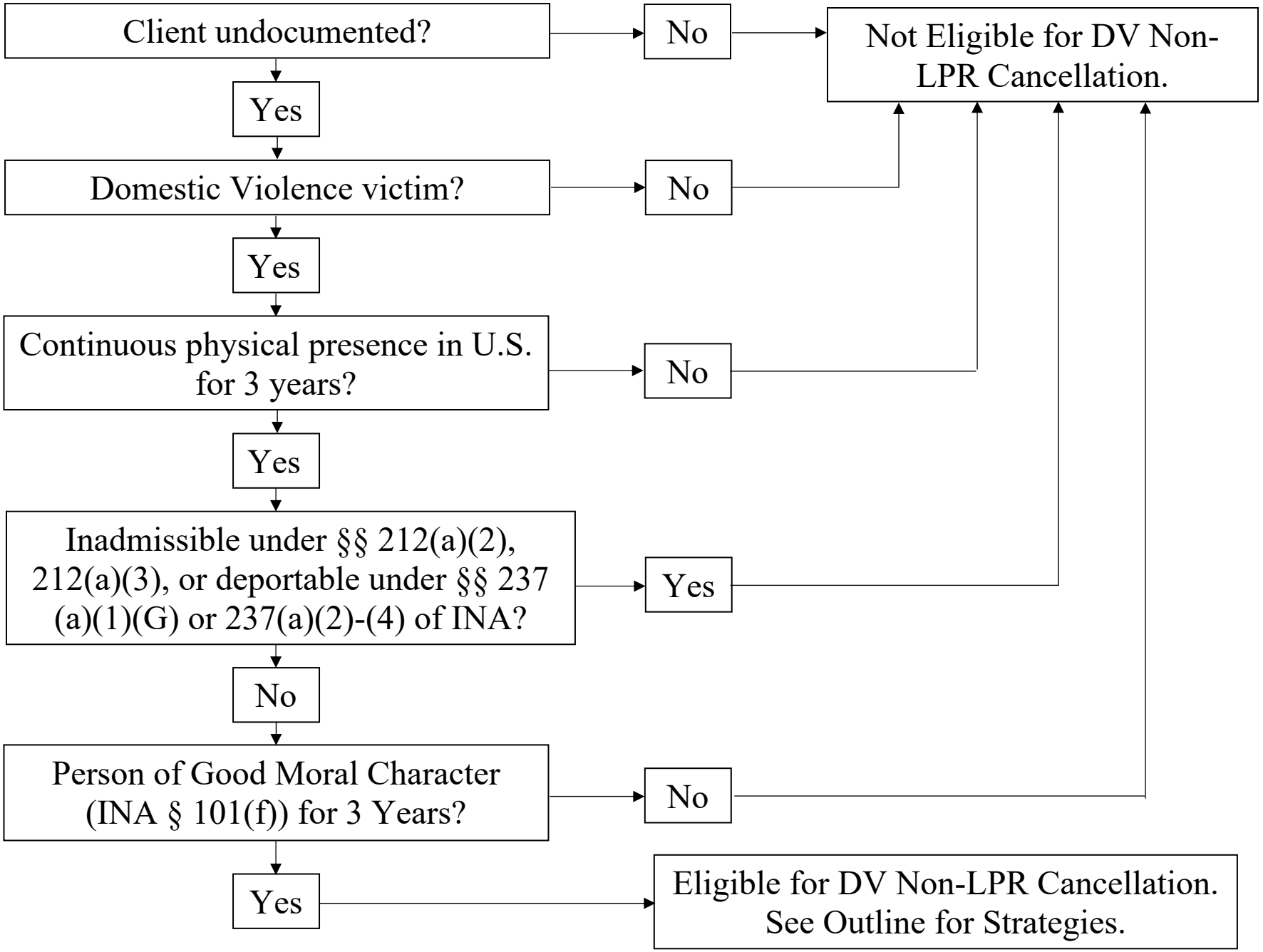
Section 212(h) Waiver



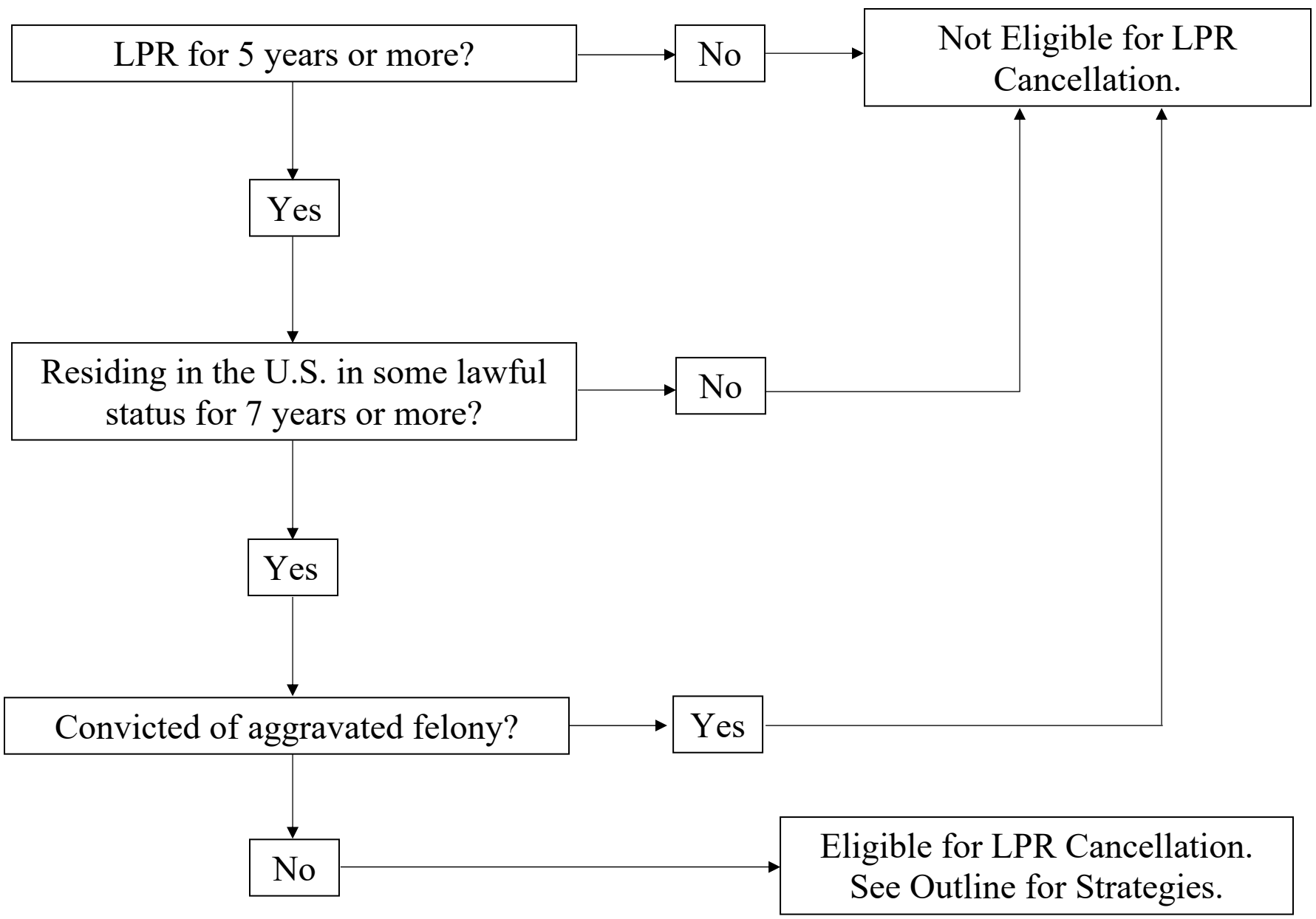
Non-LPR Cancellation



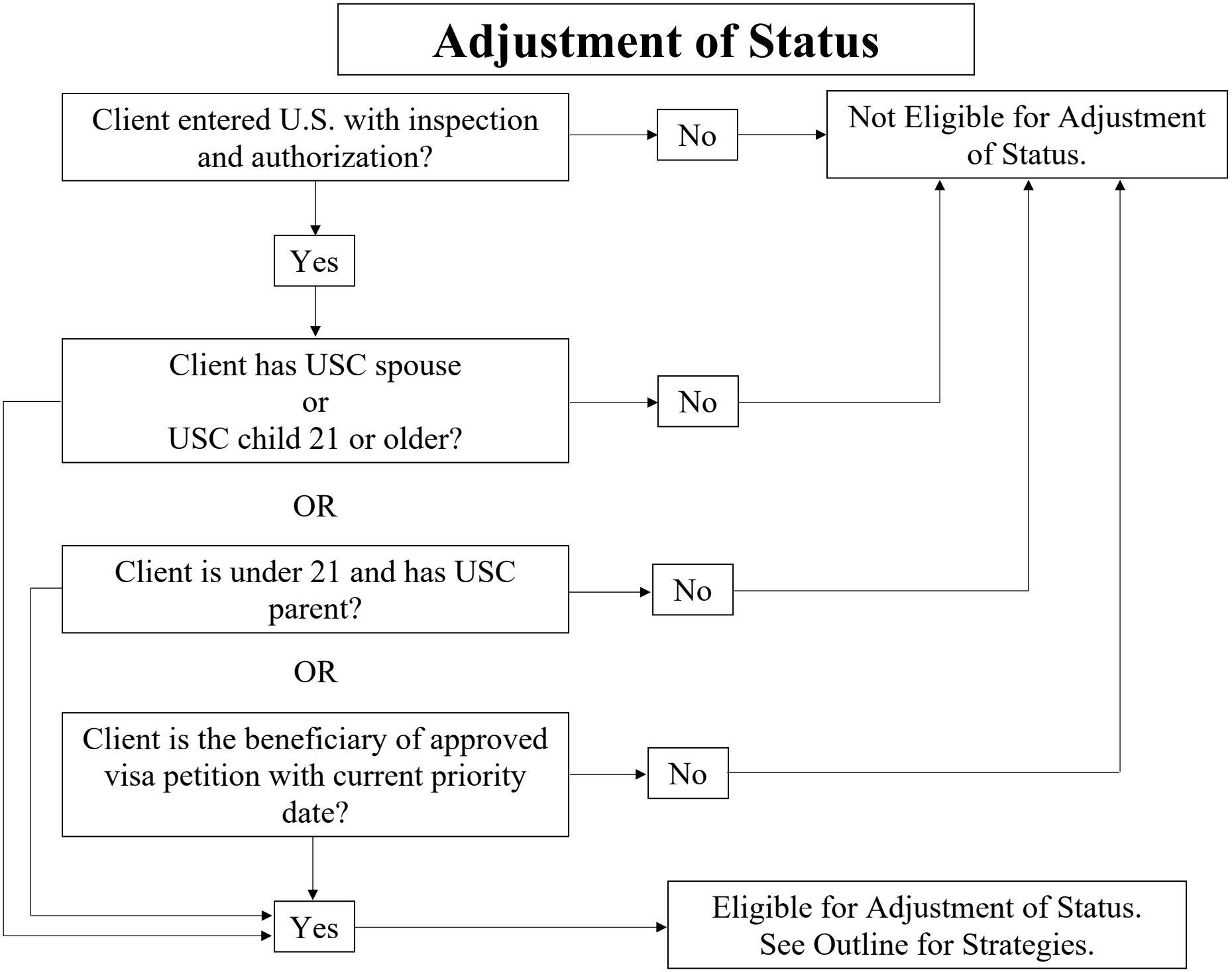
DV Non-LPR Cancellation



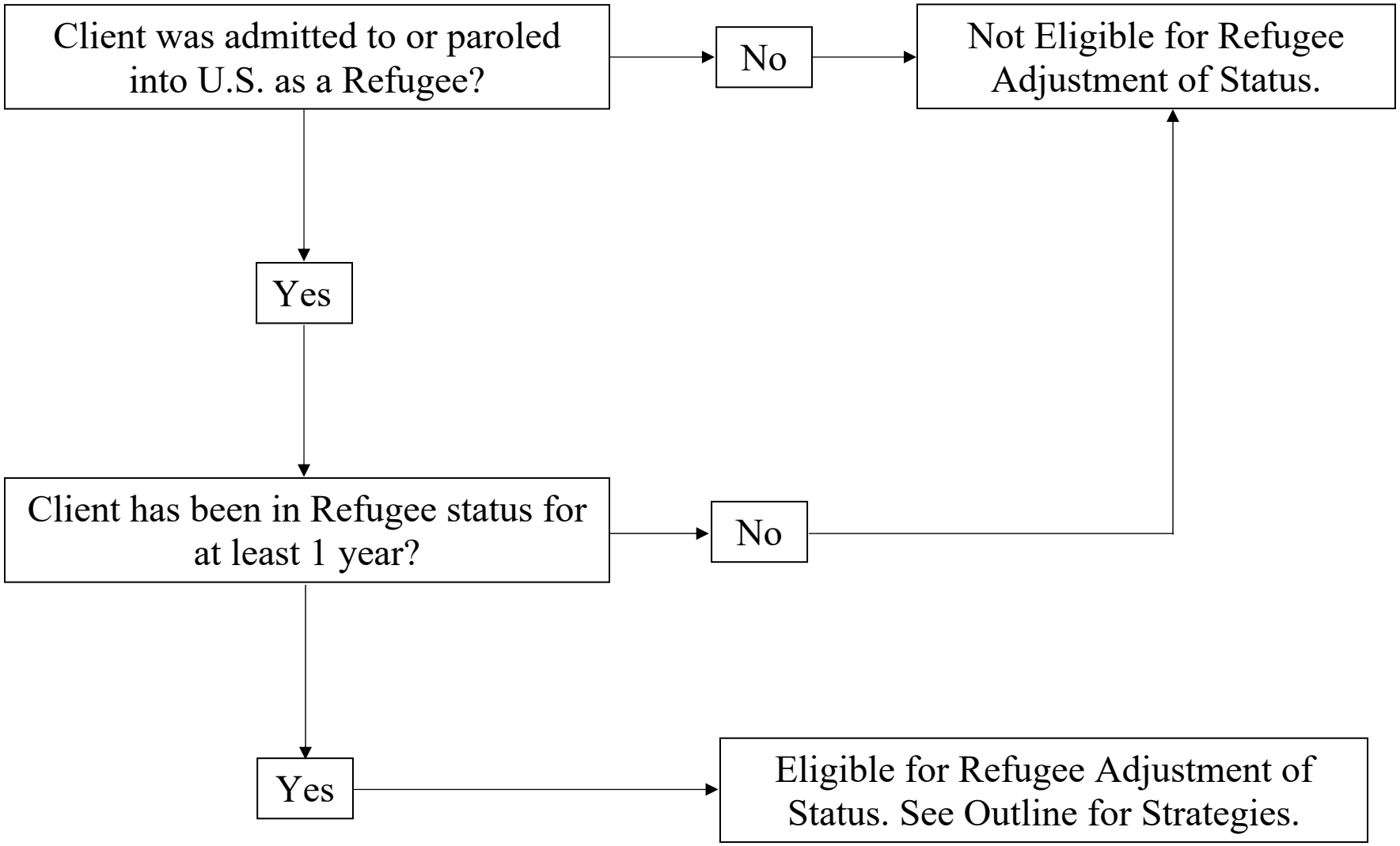
LPR Cancellation



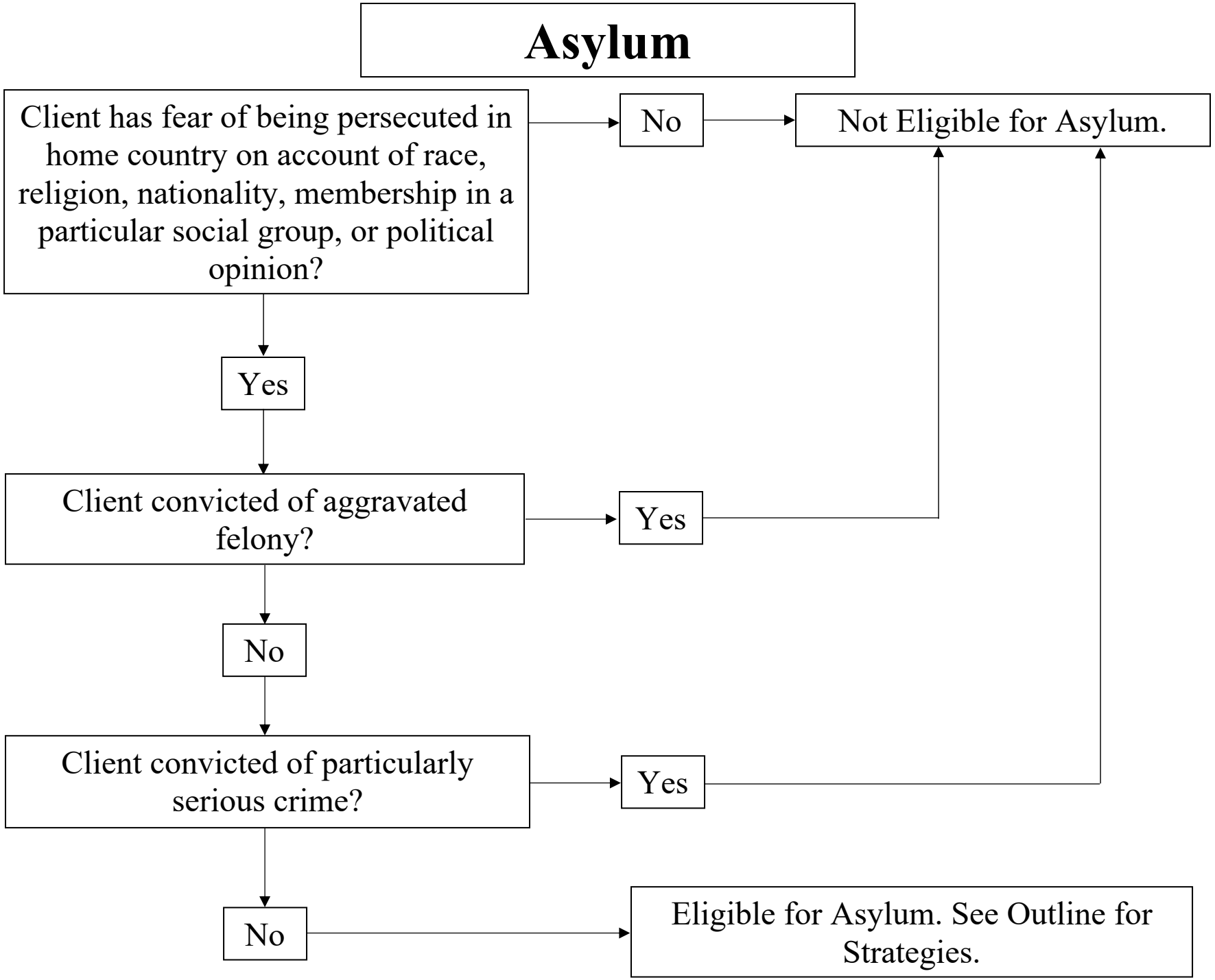
Adjustment of Status



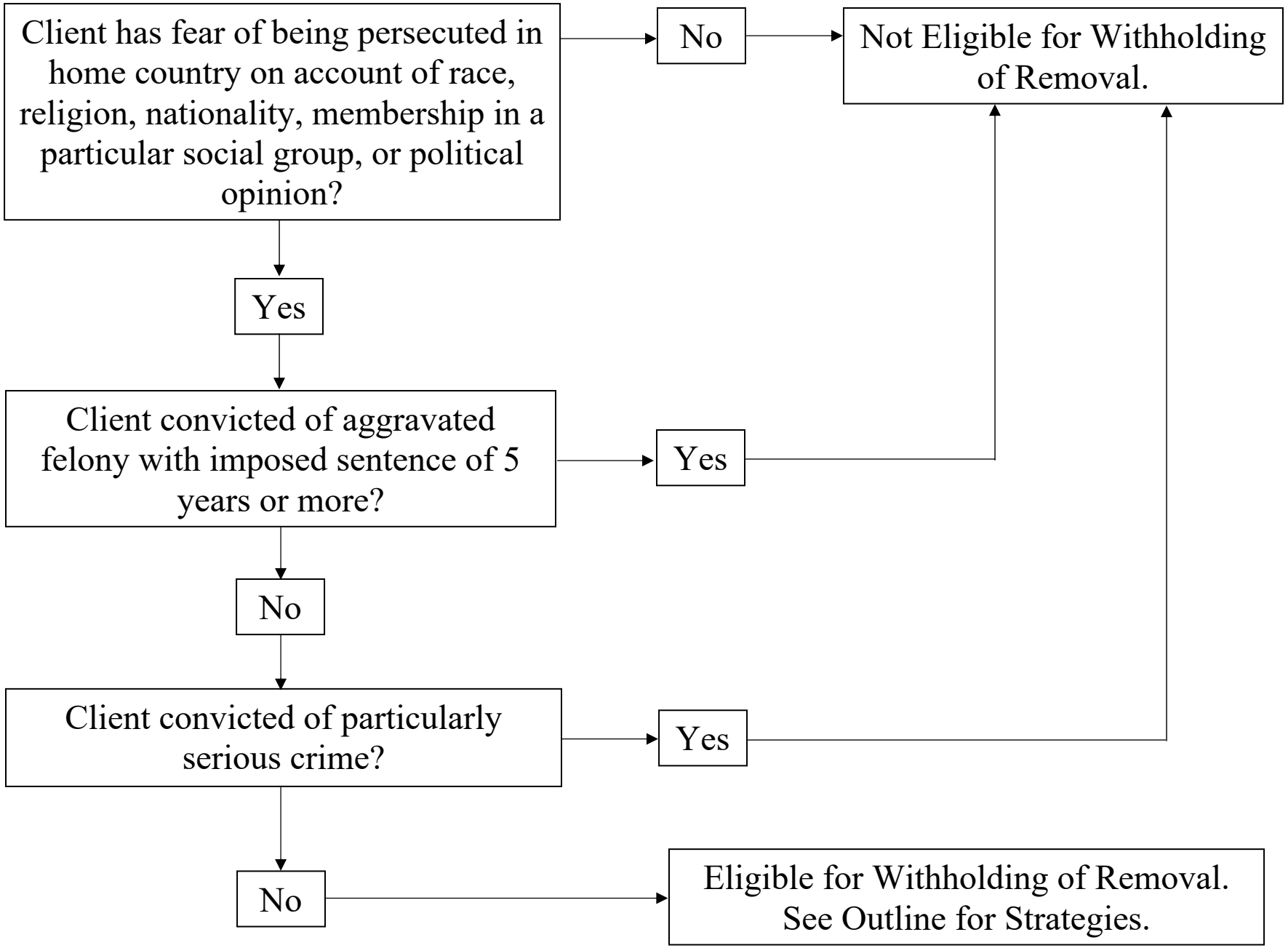
Refugee Adjustment of Status



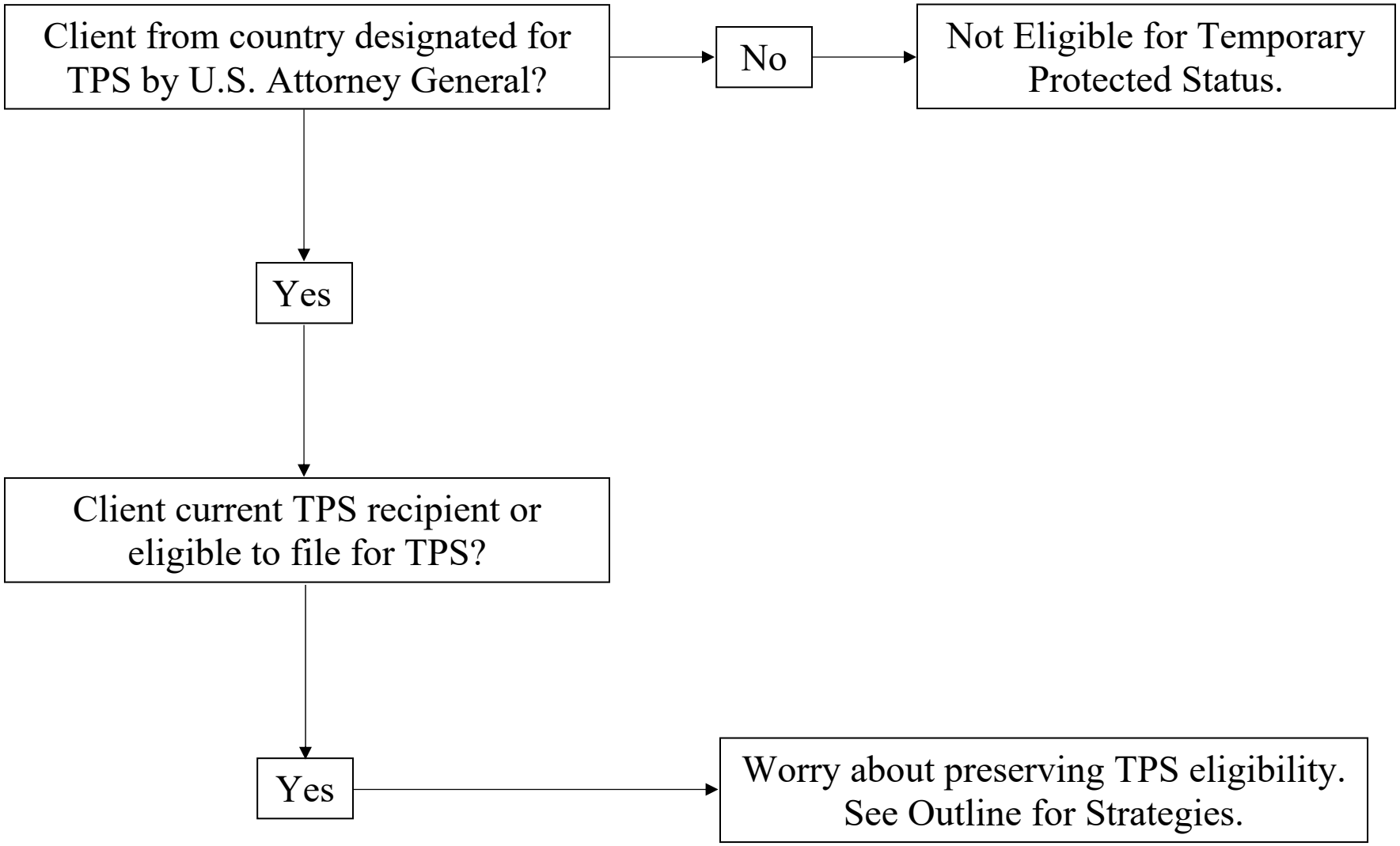
Asylum

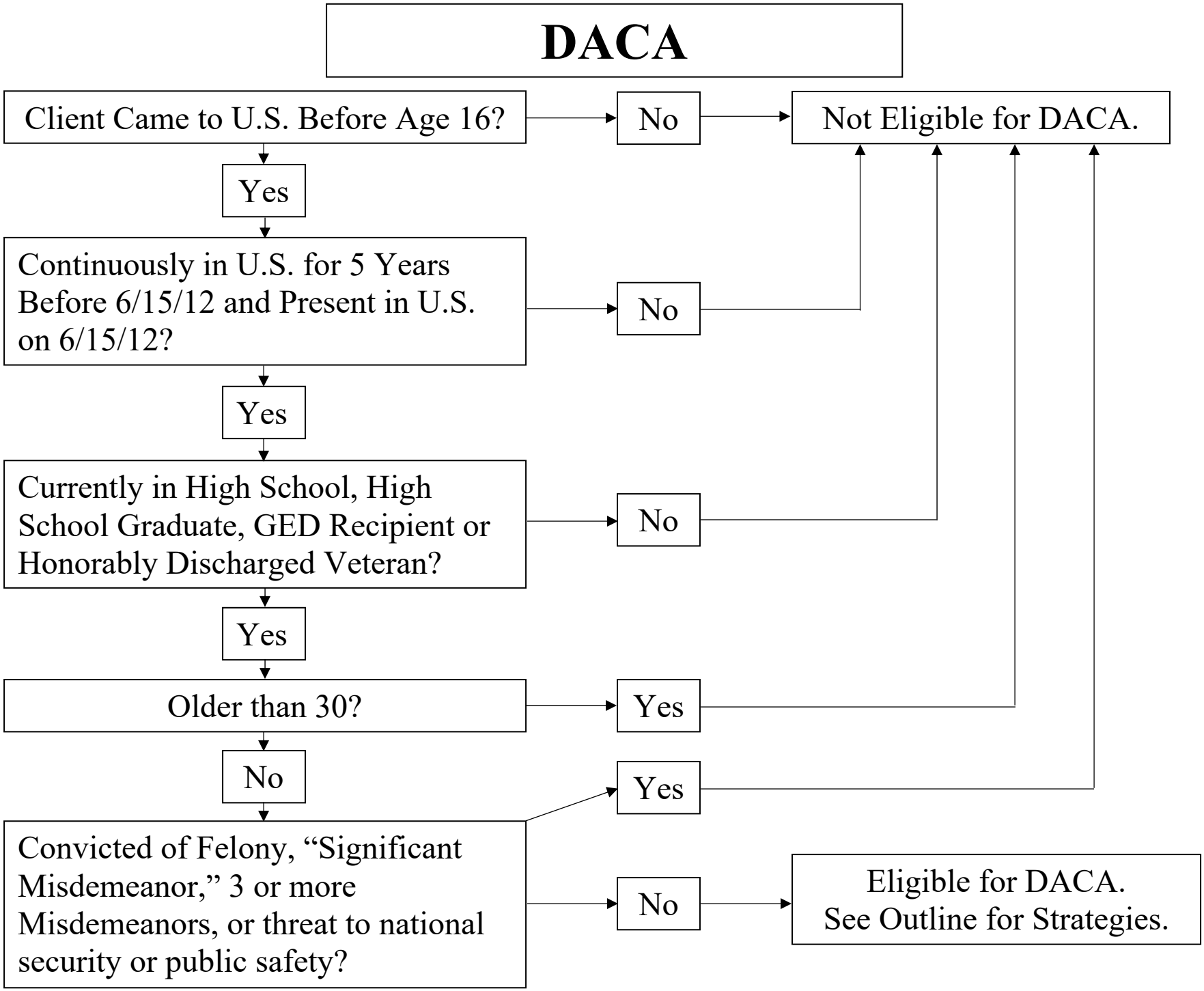

Client has fear of being persecuted in home country on account of race, religion, nationality, membership in a particular social group, or political opinion?
No
Not Eligible for Asylum.
Yes
Client convicted of aggravated felony?
Yes
No
Client convicted of particularly serious crime?
Yes
No
Eligible for Asylum. See Outline for Strategies.

Withholding of Removal

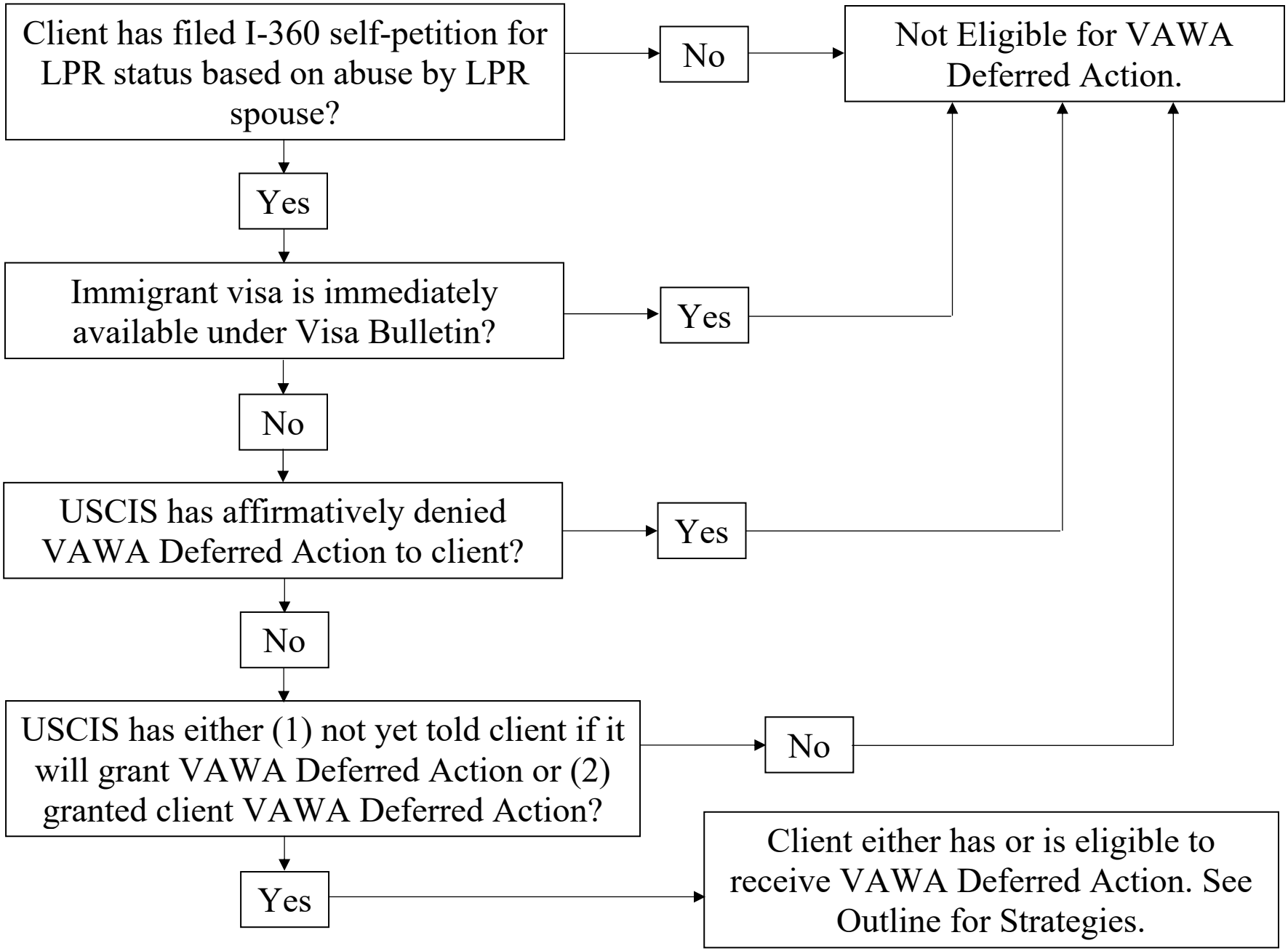


Temporary Protected Status

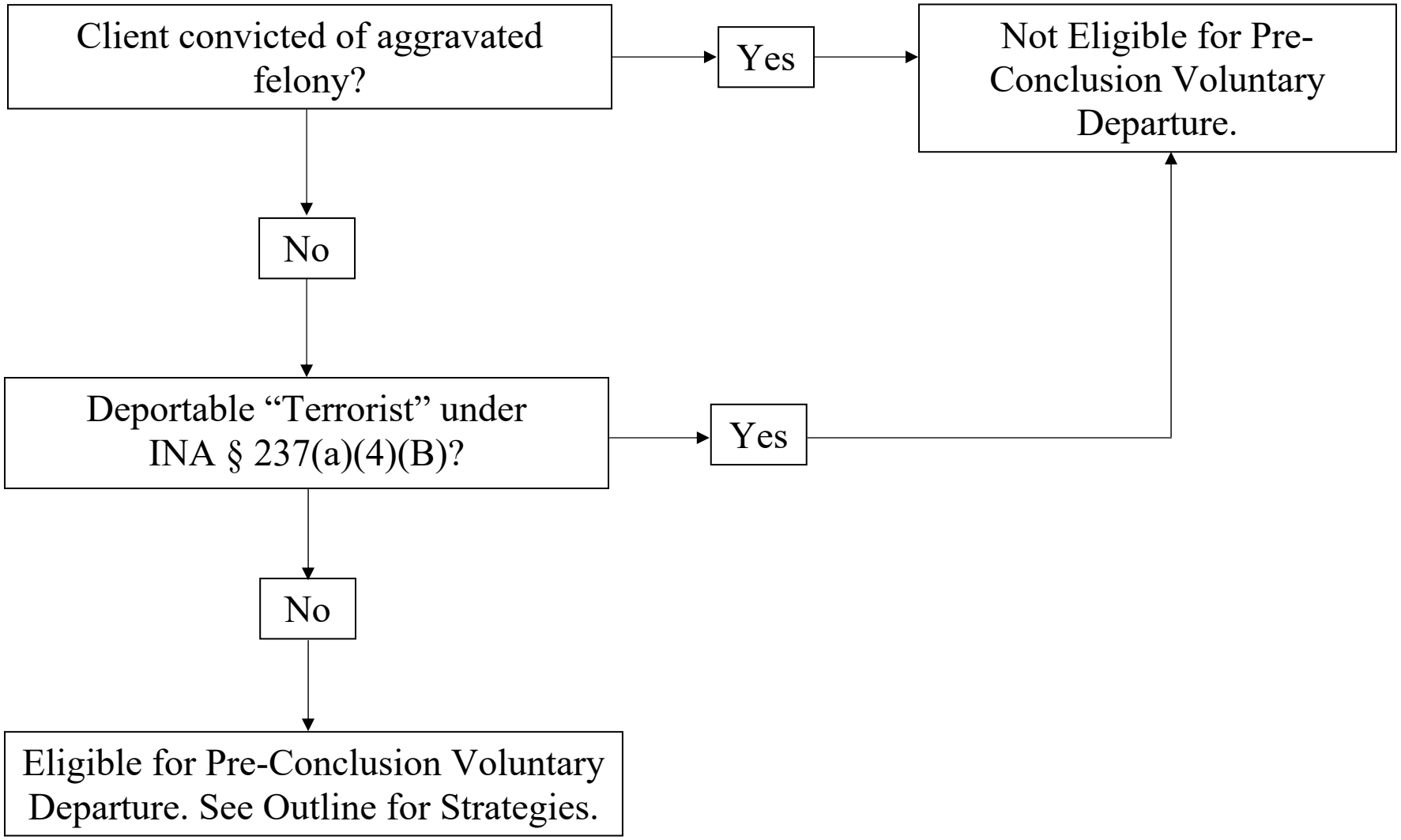



DACA
Client Came to U.S. Before Age 16?
No
Not Eligible for DACA.
Yes
Continuously in U.S. for 5 Years Before 6/15/12 and Present in U.S. on 6/15/12?
No
Yes
Currently in High School, High School Graduate, GED Recipient or Honorably Discharged Veteran?
No
Yes
Older than 30?
Yes
No
Yes
Convicted of Felony, "Significant Misdemeanor," 3 or more Misdemeanors, or threat to national security or public safety?
No
Eligible for DACA.
See Outline for Strategies.

VAWA Deferred Action



Pre-Conclusion Voluntary Departure



Post-Conclusion Voluntary Departure